DECODING TAX FINE-PRINT

FINANCE BILL, 2021

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CORPORATE, TAX & BUSINESS ADVISORY LAW FIRM

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Prepared for the use of clients and professional associates.

The document summarises the proposals made in the Finance Bill 2021-22 and key policy announcements and reviews them objectively.

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DIRECT TAX

INTERNATIONAL TAXATION

Liable to tax - Meaning

[Clause 3] **(w.e.f. 01.04.2021)**

- The Act does not define meaning of the term "liable to tax" though the said term is used in section 6, section 10(23FE) and various Tax Treaties entered into by India with other countries
- Accordingly, Finance Bill, 2021, has proposed to insert clause (29A) to section 2 of the Act to define the term 'liable to tax' as under:

  "*"liable to tax", in relation to a person, means that there is a liability of tax on such person under any law for the time being in force in any country, and shall include a case where subsequent to imposition of tax liability, an exemption has been provided"*
- The issue of stateless persons has been bothering the tax world for quite some time since
  - it is possible for an individual to arrange his affairs in such a fashion that he is not liable to tax in any country or jurisdiction during a year
  - Such arrangement is typically employed by high net worth individuals for avoiding payment of taxes in any country whatsoever thereby leading to double non taxation
- The Finance Act, 2020 inserted section 6(1A) to the Act to provide that an Indian citizen shall be deemed to be resident in India if
  - his total income, other than income from foreign sources, exceeds Rs. 15 lakhs during the previous year and
  - he is not liable to tax in any country or jurisdiction by reason of his domicile or residence or any other criteria of similar nature
- The Indian government vide Press Release dated 04.02.2020 had clarified that Section 6(1A) is not intended to tax those Indian citizens who are bonafide workers in countries such as the Middle East wherein their income is not liable to tax
- Accordingly, the Finance Act, 2020 also inserted Explanation to section 6 of the Act to define "income from foreign sources" to mean income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India) and which is not deemed to accrue or arise in India

- Accordingly, even after the amendment proposed vide Finance Bill, 2021, bonafide workers abroad who do not qualify as resident under section 6(1) of the Act shall continue to be exempt from tax in India provided their income is not derived from an Indian business or profession.

- The Supreme Court in the case of **UOI v. Azadi Bachao Andolan (263 ITR 706)** while deciphering the meaning of the said term observed as under:

  - test for "liability for taxation" is not to be determined on the basis of an exemption granted in respect of a particular source of income
  - "Liability of tax" is not the same as "payment of tax" since "liability to tax" is a legal situation (subjective tax liability) and "payment of tax" is a fiscal fact (objective tax liability)
  - Merely because exemption has been granted from income-tax in respect of particular source of income, it cannot be postulated that the taxable entity is not "liable to tax"
  - Once a person is "liable to tax" in source statehe is eligible for claiming treaty benefits in source state without evaluating whether a particular source of income is taxable in State R

- Various countries in Middle East such as UAE, Saudi Arabia do not impose income tax.

- Accordingly, an issue arose that since the aforesaid countries do not impose any income tax, then whether an Indian citizen residing in the said countries can wriggle out of the rigors of section 6(1A) of the Act by claiming that such person is 'liable to tax' in UAE/ Saudi Arabia though tax is not imposed by such countries?

- Mumbai Tribunal in the case of **ADIT vs. Green Emirate Shipping & Travels: 100 ITD 203 (Mum.)** and **ITO vs. Rameshkumar Goenka: ITA No. 3562/Mum/2009** relying on decision of the Supreme Court in the case of Azadi Bachao Andolan (supra) held that:

  "*It is irrelevant whether UAE actually levies tax on the income; what is relevant is that right to tax the income of its residents vests with the UAE government and not whether such right is actually exercised by it"*

- The proposed amendment seeks to nullify the aforesaid position by providing that 'liable to tax' means there is an actual liability to pay tax and include cases where the country does not impose tax due to exemptions provided in domestic laws

- A person shall be said to be liable to tax if the country does not impose a tax liability by virtue of an exemption provided in its domestic laws

- Accordingly, for instance, in the following situations, the person shall be said to be liable to tax:
  - Income earned by a U.S. Regulated Investment Company (RIC) and a U.S. Real Estate Investment Trust (REIT) is exempt from tax in US but they are still regarded as 'liable to tax' in that country since their income to the extent not distributed is taxable in US
  - In the case of KnoWerX Education India Pvt. Ltd, In Re: 301 ITR 207 (AAR), the AAR held that *American Production and Inventory Control Society Inc,* which is a non profit organisation and exempt from tax in US is a resident of US in terms of Article 4(1) of the India-US tax treaty
  - Similarly in the case of Sri Ramachandra Educational and Health Trust, In Re: 181 Taxman 74 (AAR) held that Harvard Medical International, a public charity in the US is specifically exempt from tax in US and is a resident of US in terms of Article 4(1) of the India-US tax treaty

Whether benefit can be claimed under tax treaties

- Article 4 of the OECD Model Convention which defines the term 'resident' reads as under:

  "1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein"

- The term 'liable to tax' has not been defined in the Tax Treaties
- Article 3(2) of the OECD Model Convention provides that definition from the domestic law may be adopted, only if not defined in the treaty and the context otherwise requires
- Accordingly, if the other country does not impose tax on an Indian citizen, then India may adopt a position that such person is not liable to tax in the said country and hence, does not qualify as a resident of that country
- The proposed amendment seems to be at a departure from the international understanding on the meaning of the term "liable to tax" for tax treaty purposes
- It needs to be seen whether the meaning of the term 'liable to tax' can be read into the treaty by invoking Article 3(2) of the Treaty

- Clause 2(29A) uses the phrase *"a liability of tax... under any law"* which appears to be in line with the decision of the Bombay High Court in the case of DIT vs. Chiron Bearing Gmbh & Co: ITA No. 2273/2010 wherein a partnership firm established in Germany and liable to trade tax but not income tax was held to be 'liable to tax' in Germany for purposes of Article 4 since trade tax is one of the taxes covered under Article 2 of the India-Germany tax treaty

Whether benefit available under India UAE/ Saudi Arabia Tax Treaty?

- Article 4(1) of the India-UAE and India-Saudi Tax Treaty are similarly worded. Article 4(1) of the India-UAE Treaty defines the term resident as under:

> *"1. For the purposes of this Agreement the term 'resident of a Contracting State' means:*
>
> *(b) in the case of the United Arab Emirates: an individual who is present in the UAE for a period or periods totalling in the aggregate at least 183 days in the calendar year concerned, and a company which is incorporated in the UAE and which is managed and controlled wholly in UAE."*

- Unlike other treaties wherein a person who is 'liable to tax' in a state can qualify as a resident of that state, the India-UAE treaty only requires that an individual can qualify as a resident in UAE if he is present in that country for more than 183 days

- In case of dual residency, such person will be treated as a resident of the country where his economic and personal interests are situated

EQUALISATION LEVY

Rationalisation of the provisions of Equalisation Levy

[Clause 159] **(w.r.e.f. 01.04.2020)**

- Equalisation Levy ('EL') was first introduced in India vide FA, 2016 as a 6% levy on payments made by residents to non-residents for online advertisements
- Scope of EL was thereafter expanded vide Finance Act, 2020 by way of inserting section 165A in the Finance Act, 2016 along with other consequential amendments
- There was ambiguity as to applicability of the expanded EL provisions which have been clarified in the amendments proposed by the Finance Bill, 2021.

A. Interplay on application of provisions of the Act and EL

- As per section 10(50) amended vide FA 2020, any income of non-resident arising from any e-commerce supply or services made or provided or facilitated on or after 01.04.2021 and chargeable to EL was exempt from tax
- Thereby any transactions that are taxable as royalty or FTS under provisions of the Act could instead be subjected to EL and in terms of section 10(50) could be claimed as exempt under the Act
- Further, there was ambiguity as to taxation under the Act and EL for eligible transactions undertaken between 01.04.2020 to 31.03.2021
- It is now proposed to amend the provisions related to EL as under:
  - Proviso is proposed to be inserted in section 163 of the FA 2016 to clarify that consideration received or receivable for specified services and consideration received or receivable for e-commerce supply or services shall not include consideration which are taxable as royalty or fees for technical services in India under the Act read with the relevant DTAA
  - It is further proposed to insert an Explanation to section 10(50) to clarify that exemption under said section will not apply to income which is chargeable to tax as royalty or fees for technical services in India under the Act read with the relevant DTAA
- Further, the amendment proposed in clause (50) of section 10 is made effective w.e.f. assessment year 2021-22 itself (when the scope of EL was expanded to apply to e-commerce supply or services)

- As a consequence, w.e.f. financial year 2020-21 itself, any income in the nature of royalty or fee for technical services that is taxable under the Act read with DTAA would not be chargeable to EL

Comment

- A transaction which is in the nature of royalty or FTS, which may otherwise be exempt from tax under the provisions of DTAA, eg. copyright in license may not be getting transferred, or by application of make available clause, or performance rule, etc. would now be chargeable to EL

B. Scope of e-commerce supply or services

- The term "e-commerce supply or services" is defined in clause (cb) of section 164 of the FA 2016 as follows:

> *"(cb) "e-commerce supply or services" means—*
>
> *(i) online sale of goods owned by the e-commerce operator; or*
>
> *(ii) online provision of services provided by the e-commerce operator; or*
>
> *(iii) online sale of goods or provision of services or both, facilitated by the e-commerce operator; or*
>
> *(iv) any combination of activities listed in clause (I), (ii) or clause (iii)"*

- Hitherto the expression 'online sale of goods' used in section 164(cb) of FA 2016 was being interpreted to mean consummation of the sale must happen online.
- 'Sale' means 'transfer of title' and therefore, for sale to be effected online, title in goods must also be transferred online.
- In the context of sale of physical goods, the same could get covered under the expression 'online sale of goods' only if the transfer of title happens online; if it happens on delivery or at any other time offline as agreed between the parties, the transaction could not get covered under the scope of EL
- Likewise, "online sale of services" was interpreted to mean consummated / rendered online
- It is now proposed to amend the definition retrospectively from financial year 2020-21 by inserting an Explanation providing that for the purposes of defining e-commerce supply or service, "online sale of goods" and "online provision of services" shall include **one or more of the following activities taking place online:**

(a) Acceptance of offer for sale;

(b) Placing the purchase order;

(c) Acceptance of the Purchase order;

(d) Payment of consideration; or

(e) Supply of goods or provision of services, partly or wholly

- It appears that every transaction of offline sale of goods or provision of services which involve some communication between the buyer and the seller online would become chargeable to EL
- Offline sale of goods or provision of services, where payment is made through digital mode, would ipso facto become exigible to EL
- Is placing/ acceptance of order through email covered under EL?

Scope of 'consideration' clarified

- Under the present provisions, in respect of e-commerce operators who are engaged in providing facilitation services qua sale of goods / provision of services, an issue arose as to whether EL @ 2% would be applicable on the consideration earned by such e-commerce operator on its commission/ margin or on the gross value of sale transacted through the digital platform
- This issue has now been clarified by inserting clause (b) in sub-section (3) in section 165A of the FA 2016 (as amended by FA 2020) which provides that **consideration received or receivable** from e-commerce supply or services **shall include:**

  (i) **consideration for sale of goods irrespective of whether the e-commerce operator owns the goods;** and

  (ii) **consideration for provision of services irrespective of whether service is provided or facilitated by the e-commerce operator.**

- Accordingly, in case of e-commerce operator being a facilitator, EL would be charged on the gross consideration received towards sale of goods / provision of services and not on the amount of commission earned by such operator

TAXATION OF BUSINESSES (COMPANIES/ MSMEs/ PARTNERSHIPS)

Goodwill – Not Depreciable Asset

[Clauses 7, 18 and 20] **(w.e.f. 01.04.2021)**

- The "cost of acquisition" of a capital asset, being goodwill of a business or a trademark or brand name associated with a business or a right to manufacture, produce or process any article or thing or right to carry on any business or profession, tenancy rights, stage carriage permits or loom hours, is defined in section 55(2)(a) to mean the purchase price if it is acquired by purchase; in other cases, nil except when where it is covered by sub-clauses (i) to (iv) of section 49(1) of the Act
- Section 2(11) defines the term "block of assets" and Section 32 deals with depreciation allowance on tangible and intangible assets used for the purposes of business
- Presently, goodwill of a business or a profession has not been specifically provided as an asset either section 2(11) or section 32 of the Act
- The Supreme Court in the case of CIT vs Smifs Securities Ltd: 348 ITR 302 held that 'Goodwill' of a business is an asset within the meaning of section 32 of the Act entitled for depreciation
- The Supreme Court allowing the claim of depreciation on goodwill arising on amalgamation observed that *"……..the words `any other business or commercial rights of similar nature' in clause (b) of Explanation 3 to S. 32 indicates that goodwill would fall under the expression `any other business or commercial right of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b). In the circumstances, we are of the view that `Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act."*
- Thus, the Supreme Court, in that case, regarded goodwill/ reputational advantage and ability to retain clientele as business/ commercial right eligible for depreciation under section 32(1)(ii) of the Act
- The Finance Ministry is of the view that goodwill, depending upon how the business runs, may see appreciation or in alternative, there is no depreciation to its value. Thus, there is no justification for the claim of depreciation on goodwill.
- Hence, it is proposed to amend -
  - section 2(11) to provide that "block of asset" shall not include goodwill of a business or profession;

- section 32(1)(ii) to provide that goodwill of a business or profession shall not be considered as an asset for the purpose of the said clause and therefore not eligible for depreciation.
- Explanation 3 to section 32(1) to provide that goodwill of a business or profession shall not be considered as an asset for the said section

✦ Cumulative effect of the aforesaid amendment is that 'Goodwill' cannot be regarded as an 'asset' or 'block of asset' on which allowance as depreciation can be claimed under section 32(1)

✦ Further, the following amendments are proposed:

- Section 50 to provide that in a case where goodwill of a business or profession formed part of a block of asset for the assessment year beginning on the 1st April, 2020 and depreciation has been obtained by the assessee under the Act, the written down value of that block of asset and short term capital gain, if any, shall be determined in the **manner as may be prescribed.**

✦ It is proposed to amend -

- section 55 of the Act by substituting clause (a) of sub section (2) to provide that in relation to a capital asset, being goodwill of a business or profession, or a trademark or brand name associated with a business or profession, or a right to manufacture, produce or process any article or thing, or right to carry on any business or profession, or tenancy rights, or stage carriage permits, or loom hours,—

  (i) in the case of acquisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price; and

  (ii) in the case falling under sub-clause (i) to (iv) of section 49(1) and where such asset was acquired by the previous owner (as defined in that section) by purchase, means the amount of the purchase price for such previous owner; and

  (iii) in any other case, shall be taken to be nil.

✦ It is proposed to insert proviso to section 55(2)(a) that in case of goodwill of business or profession acquired by the assessee by way of purchase from a previous owner [either directly or through modes specified under section 49(1)] and any deduction on account of depreciation under section 32 has been obtained by the assessee in any previous year preceding the previous year relevant to the assessment year commencing on or after the April, 2021, then the cost of acquisition will be the purchase price as reduced by the depreciation so obtained by the assessee before the previous year relevant to assessment year commencing on April, 2021.

- Accordingly, section 2(11) of the Act would be modified as under:

  ""block of assets" means a group of assets falling within a class of assets comprising—

  (a) tangible assets, being buildings, machinery, plant or furniture;

  (b) intangible assets, being know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, ***not being goodwill of a business or profession,***

  in respect of which the same percentage of depreciation is prescribed"

- Section 32(1) along with Explanation 3 would read as follows:

  "32. Depreciation.— (1) In respect of depreciation of-

  (I) ……

  (ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April,1998, not ***being goodwill of a business or profession,***

  owned, wholly or partly, by the assessee and used for the purposes of the business or profession and used for the purposes of the business or profession, the following deductions shall be allowed-

  (I) ……..

  (ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed.

  ……..

  Explanation 3- —For the purposes of this sub-section, the expression 'asset' shall mean-

  (a) ……..

  (b) intangibles assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, not ***being goodwill of a business or profession."***

Comments/ Observations:

- Whether the assessee can still claim depreciation on goodwill generated under the scheme of arrangement approved by NCLT whereunder depreciation thereon is specifically approved/ allowed ? Whether scheme would override the Act ?

- Whether depreciation on other intangibles (like brand, trade marks, customer lists, distribution channels, etc) arising under the scheme of arrangement would continue to be available to the amalgamated/ resulting company ?

Rationalization of the provision of presumptive taxation for professionals

[Clause 12] **(w.e.f. 01.04.2021)**

- Section 44ADA provides for special scheme of presumptive taxation for **an assessee, being a resident in India,** engaged in a profession referred to in section 44AA(1) and whose total gross receipts do not exceed Rs. 50 lakhs in a previous year, whereby 50 per cent of the total gross receipts on account of such profession, or as the case may be, a higher sum claimed to have been earned by the assessee, is deemed to be the profits and gains of such profession chargeable to tax. No books of account are required to be maintained in such cases

- The provisions of section 44ADA are presently applicable to individuals, HUF's and partnership firms but not Limited Liability Partnerships (LLP)

- The aforesaid section could not be made applicable in case of LLP owing to requirement to maintain books of account under LLP Act, 2008

- The aforesaid position, which was earlier clarified in Memorandum to Finance Bill, 2016, is now proposed to be codified by amending the language of section 44ADA(1) to provide that the provision of this section shall apply to an assessee, **being an individual, HUF or a partnership firm other than a LLP, who is a resident in India**

MINIMUM ALTERNATE TAX

Rationalization of provisions of Minimum Alternate Tax (MAT)

[Clause 31] **(w.e.f. 01.04.2021)**

- Section 115JB provides for MAT at the rate of 15 per cent of book profit, in case tax on the total income of a company computed under the normal provisions of the Act is less than the MAT so computed
- For the purpose of section 115JB, 'book profit' is computed as per statement of profit and loss prepared by the company in accordance with the provisions of the Companies Act, 2013 and no adjustment other than provided in the explanation to said section is possible.

Adjustment for past years' income

- On the conclusion of APA executed under section 92CC of the Act, complications often arise while computing book profit under MAT. While the transfer pricing adjustment arising from APA concluded for past years is considered in modified tax returns for the respective past years and offered to tax under normal provisions, the same is recorded in the books of account of the year in which the APA is concluded
- Similar situation arises in case of secondary adjustment made under section 92CE of the Act
- This was resulting in a mis-match and possible double taxation once under the normal provisions and then again under the MAT provisions
- The existing MAT provisions do not provide for any specific exclusion for such transfer pricing adjustment while computing the book profit under section 115JB of the Act
- It is proposed that MAT shall not be applicable on such past year incomes in the year in which it is recorded in the books of account, but would be considered as part of the book profit determination in the year to which such transfer pricing adjustment pertains
- Accordingly, a new sub-section (2D) is proposed to be inserted in section 115JB whereby it is provided that the assessing officer, on an application made by assessee under section 154 of the Act, shall re-compute the book profit of relevant preceding years and tax payable, if any, during the previous year, in the prescribed manner

Adjustment for dividend income

- FA, 2020 had abolished Dividend Distribution Tax and consequently dividend income arising to a foreign company is chargeable to tax at special rate of 10 percent under the Act. However, in case

where such foreign company has a permanent establishment in India, such company is presently required to pay MAT at a higher rate on the dividend income

- Clause (iid) was inserted in Explanation 1 vide FA, 2015 providing for exclusion of incomes in the nature of capital gains on transfer of securities, interest, royalty or FTS while computing book profit of a foreign company in case where such incomes were chargeable to tax at a rate lower than 15 percent. As a corollary, clause (fb) was also inserted to provide addition of corresponding expenditure incurred to earn the above incomes

- It is proposed to amend clauses (fb) and (iid) to provide for similar treatment to dividend income and corresponding expenditure incurred to earn such dividend income

Comments:

- This amendment seeks to bring dividend income at par with other streams of income like royalty and FTS that are taxed on source basis at specified rates under the Act for non-residents

- This amendment is applicable only in case of foreign companies on whom MAT provisions are applicable in terms of Explanation 4 and 4A of section 115JB of the Act

CAPITAL GAINS AND BUSINESS RE-ORGANISATION

Amendment to sections 43CA & 56(2)(x) – Boost to real estate sector

[Clauses 10 & 21] **(w.e.f. 01.04.2021)**

- Section 43CA applies to transaction of transfer of land or building held as stock in trade by the transferor at less than stamp duty value ('SDV')
- Section 56(2)(x) applies to transaction of receipt of property by the transferee at less than SDV
- Where the transfer of property is at less than SDV, then the consideration shall be substituted by SDV of the property being transferred and income shall be computed accordingly
- Presently the provisions of section 43CA and 56(2)(x) of the Act provides for safe harbour of 10% i.e., where the SDV of the property does not exceed 110% of actual sales consideration, then the consideration amount shall not be substituted by the SDV of the property
- As a part of 'Aatma Nirbhar Bharat 3.0' package announced by the Hon'ble FM on 12.11.2020, certain tax reliefs were announced to boost the demand in real estate sector and to enable the real-estate developers to liquidate their unsold inventory at a lower rate to home buyers. It was proposed to increase the safe harbour threshold from existing 10% to 20% under section 43CA of the Act, if the following conditions are satisfied:
  - The transfer of residential unit takes place during the period from 12.11.2020 till 30.06.2021;
  - The transfer is by way of first time allotment of the residential unit to any person; and
  - The consideration received or accruing as a result of such transfer does not exceed Rs. 2 crores
- Consequential relief was proposed to be extended to home buyers by way of amendment in section 56(2)(x) by increasing the safe harbour from 10% to 20%
- The aforesaid tax reliefs are now proposed to be codified by way of amendments in sections 43CA and 56(2)(x) of the Act
- The amendments would apply to assessment year 2021-22 and subsequent years

Capital Gain on Dissolution/ Re-constitution of Partnership Firms

[Clauses 14 & 16] **(w.e.f. 01.04.2021)**

- Under the existing provisions of the Act, where the partner withdraws money from capital account with the partnership firm, post revaluation of assets, there is no provision to tax the same, either in the hands of the partnership firm or the partner.

- Reference can be made to the decision of Supreme Court in the case of **CIT vs. Mohanbhai Pamabhai: 165 ITR 166,** wherein it has been held that the interest of a partner in the partnership is not interest in any specific item of the partnership property, it is a right to obtain his share of profits from time to time during the subsistence of the partnership and on dissolution of the partnership or his retirement from the partnership, to get the value of his share in the net partnership assets which remain after satisfying the debts and liabilities of the partnership and therefore on retirement there is no transfer of the property.

- Section 45(4) through the deeming fiction imposes tax in the hands of firm, in a situation where the capital asset of the firm is distributed to partner on dissolution or otherwise.

- The scope of aforesaid section is, however, limited to distribution of capital asset and not to distribution of money on withdrawal of capital balance by the partner.

- In order to tax the situation of withdrawal of enhanced capital balance by way of money, it is proposed to substitute the existing provisions of section 45(4) with new sub-section (4) and (4A), to provide as under:

For Distribution of Capital Asset (Amended Section 45(4))

- It is proposed to insert new sub-section (4) in section 45 to provide that if any partner of the firm receives during the previous year **any capital asset** as **a result of dissolution/re -constitution which represents his/her capital balance at that time**, then the profit **(FMV of the capital asset – cost of acquisition of asset)** arising from receipt of such capital asset by the partner will be taxable as capital gain in the hands of the firm in the year in which such capital asset was received by the partner. Further, the balance in capital account is to be calculated without taking into account increase in the value due to revaluation of any asset.

Comment / Observations:

- Under the existing provisions of section 45(4), there was a debate whether distribution of capital asset in case of re-constitution of firm by way of retirement or change in profit sharing ratio etc., would be covered within the scope of the said provisions.

- **Favourable decisions**
  - CIT vs. Dynamic Enterprises: 359 ITR 83 (Kar)
  - CIT vs. G. Seshagiri Rao : 213 ITR 304 (AP)

- **Against decisions:**
  - CIT vs. A.N. Naik Associates: 265 ITR 346 (Bom)
  - ACT vs. Gurunath Talkies: 226 CTR 474 (Kar)
- In order to put quietus to the matter, the amended provision uses the word reconstitution, which would cover the cases of distribution of capital asset in case of any reconstitution of the firm by way of retirement or otherwise.
- However, some clarity may be required to understand the import of expression "which represent his or her capital balance at that time" for the purposes of computation of said capital gain.

For Distribution of money or other Asset (Amended Section 45(4A))

- The sub-section (4A) proposed to be introduced provides that if any partner of the firm receives during the previous year **any money or other asset** as a result of dissolution/re-construction **which is in excess of his/her capital balance at that time,** then the profit **(FMV of the other asset – the balance in the capital account)** arising from receipt of such money or other asset by the partner will be taxable as capital gain in the hands of the firm in the year in which such capital asset was received by the partner. Further, the balance in capital account is to be calculated without taking into account increase in the value due to revaluation of any asset.
- A consequential amendment has also been made under section 48 which provides for mode of computation of capital gains for the purpose of section 45, to provide that, where a capital asset (which has been revalued by the firm) is subsequently transferred by the firm, the amount of capital gains already offered to tax under section 45(4A) at the time of distribution to the partner will be reduced from the full value of consideration/capital gain.
- The aforesaid amendment seeks to avoid double taxation of capital gains, offered to tax (i) at the time of distribution to partner and (ii) at the time of sale of revalued asset.

Comment / Observations:

- The proposed new provision of section 45(4A) seeks to impose capital gain tax on withdrawal of enhanced capital balance by the partners, by way of money or in other asset, which was hitherto not being taxed, having regard to the jurisprudence pointed supra.
- While the excess money is withdrawn by the partner, the incidence of tax has, however, been imposed on the firm distributing money / asset.

- The taxable event is, however, arising only with respect to enhanced capital balance post re-valuation; withdrawal to the extent of original capital balance is not liable to taxation even under the amended provisions, in view of ratio laid down by the decisions referred supra.

- The proposed amendment seeks to make distinction between distribution of capital asset and asset other than capital asset including money.

Rationalization of provisions of slump sale

[Clause 3] **(w.e.f. 01.04.2021)**

- Section 50B of the Act contains special provision for computation of capital gains in case of slump sale.

- Section 2(42C) defines slump sale to mean transfer of one or more undertakings as a result of sale for lump sum consideration without value being assigned to individual assets and liabilities in such cases.

- The word used in the aforesaid section is 'Sale". Courts have held that, the word 'sale' is a narrow expression than the word 'transfer' in section 2(47) and is, therefore, also distinct from 'exchange'. It is held that, transfer would fall within the meaning of 'Sale', only if the same is in lieu of cash/money. {Refer, **CIT vs. R. R. Ramkrishna Pillai: 66 ITR 725 and CIT vs. Motors & General Stores (P.) Ltd. (66 ITR 692)**}

- Having regard to above, the issue arose with respect to taxation of capital gain on slump sale, where consideration was discharged by modes other than cash, like issue of shares (equity/preference shares, etc.). The Courts/Tribunals in the following cases held that transfer of an undertaking other than by way of sale would not fall within the ambit of slump sale:

  - CIT vs. M/s Bharat Bijlee Ltd.: 365 ITR 258 (Bom. HC)
  - Pr. CIT v. UTV Software Communication Ltd.: 261 Taxman 562 (Bom. HC)
  - Areva T & D India Ltd 428 ITR 1 (Mad.)
  - Oricon Enterprises Ltd. v. ACIT: 171 ITD 231 (Mum Trib.)
  - ITO v. Zinger Investments Pvt. Ltd.: 147 ITD 694 (Hyderabad - Trib.) >Avaya Global Connect Ltd. v. ACIT [2008] 26 SOT 397 (ITAT Mumbai)

- A contrary view was taken by the Delhi High Court in the case of **SREI Infrastructure Finance Limited vs. Income Tax Settlement Commission [2012] 207 Taxman 74 (Del),** wherein it was held that on transfer of business in exchange of another asset, there was indeed monetary

consideration which was discharged in the form of shares and thus the provisions relating to taxability of slump sale would cover instances of slump exchange.

- The aforesaid decision was distinguished by the Bombay High Court in case of **M/s Bharat Bijlee Ltd (supra)** on the ground that, in the said case the assessee had admitted that there was monetary consideration in the scheme of arrangement and accordingly, the transaction was held to be in the nature of "sale" and not "exchange".

- As a consequence, it was argued that, since the computation mechanism to compute capital gain on transfer of undertaking fails, the gain cannot be brought to tax. **[CIT v. B.C. Srinivasa Setty: [1981] 128 ITR 294 (SC) and PNB Finance Ltd. v. CIT: [2008] 175 Taxman 242 (SC)]**

- It is stated in the Memorandum that intent of the provision was to charge capitals gains on slump sale of business where the consideration was discharged by way of non-monetary asset instead of cash.

- In order to align the section with its real intent, it is proposed to amend section 2(42C) of the Act by:
  - substituting the words "undertaking as a result of the sale" with the words "undertaking, by any means," and
  - inserting Explanation 3 therein providing that for the purposes of this clause, "transfer" shall have the meaning assigned to it in section 2(47);

Comments:

- The amendment has the effect of widening the scope of slump sale to include within its ambit, transfer by all modes stated under section 2(47) viz., exchange or relinquishment of the asset, or extinguishment of any rights therein etc.

- The amendment applies prospectively from assessment year 2021-2022 and thus, slump exchange transactions already concluded before FY 2020-21 could be argued to be not taxable under the amended provision.

START-UPS

Incentives for Start-ups under section 54GB

[Clauses 19] **(w.e.f. 01.04.2021)**

- The existing provisions of section 54GB of the Act provide that capital gains arising from the transfer of a long-term capital asset, being a residential property owned by an individual/ HUF, shall not be charged to tax where the net consideration is utilized by the assessee for subscription in the equity shares of an eligible Start-up and such company has utilized the investment for purchase of new asset within one year from the subscription date.
- The aforesaid benefit is available only when the residential property is transferred on or before 31.03.2021.
- In order to extend the aforesaid benefit for investment in eligible Start-up, the amendment proposes to extend sunset date for transfer of residential property from 31.03.2021 to 31.03.2022.

Extension of benefits to Start-Ups

[Clause 25] **(w.e.f. 01.04.2021)**

- The existing provisions of section 80-IAC of the Act provide for 100% deduction of profits and gains derived from an eligible business carried on by an eligible start-up for a period of 3 consecutive years out of 10 years, at the option of the assessee, subject to the condition that, inter alia, start up is incorporated on or after April 1, 2016 but before April 1, 2021.
- In order to further incentivize the start-ups in India, it is proposed to amend section 80-IAC to provide the extension in the outer date of incorporation of a start-up company from 01.04.2021 to 01.04.2022.

COMPUTATION, ASSESSMENT AND RE-ASSESSMENT

COMPLETE REFORM IN THE SYSTEM OF REASSESSMENT AND ASSESSMENT IN SEARCH CASES

Rationalization of provisions relating to reassessment [Section 147 to 151, 153A and 153C]

[Clauses 35 to 40, 42 and 43] **(w.e.f. 01.04.2021)**

Existing Provisions at a glance

Sections 147 to 151	Section 153A	Section 153C
• **Prerequisite** - Reason to believe that income chargeable to tax has escaped assessment [Section 147/148] • **Time limit** - Notice to be issued within 4 years/6 years/16 years [Section 149] • **Sanction -** Prior approval to be obtained before issue of notice [Section 151]	• **Prerequisite** - Search initiated under section 132 or requisition under section 132A of the Act; • **Time limit** – 6/10 AYs immediately preceding the year of search/ requisition and the relevant year – Abatement of on-going assessments, if any.	• Prerequisite – Any specified search material 'belonging to or' information relating to non-searched person found as a consequence of search. • **Time Limit** - 6/10 AYs immediately preceding the year of date of receipt of seized material to AO and the relevant year – Abatement of on-going assessments, if any.

Proposed Amendments

- ✦ Existing provisions of section 153A and 153C of the Act proposed to be phased out and made applicable only to search initiated/ requisition made on or before 31.03.2021.
- ✦ In cases where search initiated/ requisition made or material is seized or requisitioned from any other person after 31.03.2021, assessment proposed to be made under section 147 of the Act.
- ✦ Section 148 proposed to be substituted to provide that reassessment notice can be issued only when there is "information" (except search/ survey cases) with the assessing officer that income chargeable to tax has escaped assessment, subject to prior approval of specified authority and order under section 148A.

- **"Information"** for the purpose of section 148 has been specifically defined in Explanation 1 to **mean:**

  a) any information flagged in accordance with risk management strategy of the Board;

  b) any **final objection** raised by CAG.

- Explanation 2 to section 148 provides that in case of search, **survey** or requisition initiated or made on or after 01.04.2021, **assessing officer shall be deemed to have information which suggest that income chargeable to tax has escaped assessment** for **three assessment years** immediately preceding the assessment year in which such search/ **survey** is conducted or requisition is made or material is seized or requisitioned in case of any other person.

- New section 148A proposed to be inserted, to provide for procedure to be followed by assessing officer **before** issuance of notice under section 148 [other than search/ survey/ requisition cases]:

  a) **Conduct Enquiry** - Assessing Officer to conduct enquiry, if required, with prior approval of specified authority with respect to the "information" available;

  b) **Show Cause** - Assessing Officer to issue show cause notice to assessee and provide opportunity of being heard [with prior approval of specified authority] as to why notice under section 148 of the Act be not issued on the basis of "information" [Time period of 7-30 days to be provided, subject to extension]

  c) **Formal Order** – Assessing Officer to pass formal [with prior approval of specified authority] within one month on whether or not it is a fit case to issue notice under section 148.

- Procedure proposed in section 148A not applicable in case of search, survey or requisition initiated or made on or after 01.04.2021.

- Proposed amendment empowers AO to assess/ reassess income which comes to his notice subsequently in the course of reassessment proceedings notwithstanding that section 148A procedure was not followed.

- Section 149 proposed to be substituted to provide new time limits for issue of notice under section 148 of the Act:

  a) Normal cases - within 3 years from the end of the relevant AY;

  b) Specific cases – within 10 years from the end of relevant AY where AO has in his possession **books of account or other documents or evidence** indicating income escaping assessment, **represented in the form of asset,** of Rs. 50 lakhs or more.

- In case time-limit for issuance of notice under section 148 has expired as on 31.03.2021 in terms of the pre-amended provisions, then notice cannot be issued under the new section.
- Time limit for issuance of notice under section 148 of the Act to exclude:

  a) the time or extended time allowed to the assessee in providing opportunity of being heard; and

  b) period during which proceedings before issuance of notice stayed by an order of the Court.
- If after excluding the aforesaid period, time available for passing order about fitness of case for issue of reassessment notice is less than 7 days, the remaining time shall be extended to 7 days.
- Section 151 which provides for approval from specified authority is proposed to be substituted to provide for:

  a) **Approval from PCIT/PDIT/CIT/DIT** – Upto 3 years from the end of the relevant AY;

  b) **Approval from PCCIT/PDGIT/CCIT/DGIT-** If more than 3 years have elapsed from the end of relevant assessment year.
- Further, for initiating proceedings pursuant to search/ requisition in case of non-searched person, the assessing officer is to record **satisfaction,** with the prior approval of PCIT/CIT that any money, bullion, jewellery or other valuable article or things so seized or requisitioned **belongs** to or books of account or documents so seized **pertain/ relate** to such other person [Explanation 2(iii)/(iv) to section 148].

Comparative analysis of existing and proposed provisions

Particulars	Existing provisions for reassessment	Proposed provisions for reassessment
Search initiated/ requisition made after 31.03.2021	To be assessed under section 153A	To be assessed under section 147
Material/ Evidence seized or requisitioned, belongs/pertains or relates to a person other than the person searched after 31.03.2021	To be assessed under section 153C	To be assessed under section 147
Existence of 'reason to believe' that income has escaped assessment	Required	Not required

Reassessment after 4 years in case where regular assessment concluded under section 143(3)	Only if there is failure to disclose full and true material facts	Permitted in case where likely escapement of income is Rs.50 lakhs or more
Enquiry proceedings and opportunity of being heard before issue of notice under section 148 of the Act	Not required	Mandatory
Prior approval of specified authorities	Mandatory	Mandatory
Whether income which has escaped assessment involving matters which are subject matter of appeal/ revision can be reopened	No, as per 3rd proviso to section 147	No specific exclusion provided
Assessment in case of search matters	6 AYs immediately preceding the AY of search/ requisition [Section 153A/153C]	3/10 AYs immediately preceding the AY of search/ requisition
Time Limit	• Normal cases- 4 years; • In cases where income chargeable to tax which has escaped assessment amounts/ likely to amount to Rs.1 lac or more - 6 years • In cases of foreign asset (including financial interest) - 16 years	• Normal cases- 3 years; • In cases where likely escapement of income in the form of asset is Rs.50 lakhs or more - 10 years • No separate category for foreign asset.

Comments/ Observations - General

- New provisions, in a way, incorporate the concept of passing speaking order after affording opportunity of being heard to the assessee, prior to issuance of notice under section 148 [refer GKN Driveshaft: 259 ITR 19 (SC)]
- Reduction in time limit, incorporation of concept of pre-initiation enquiry and passing of speaking order before actual reopening is a welcome amendment, provide ease of doing business and reduce litigation.
- Definition of "information" is exhaustive and only covers information flagged by risk management strategy and final objection by CAG.
- No concept of full and true disclosure – Reopening "information" driven.
- Final audit objection, including opinion on a legal issue, may constitute "information" for reopening [impliedly overrules Indian & Eastern Newspaper Society v. CIT: 119 ITR 997 (SC)]
- No demarcation/ time limit in case of foreign income/ assets.
- What shall be the remedy available to the taxpayer against order passed under section 148?
- Whether issues which are subject matter of appeal/revision can be covered in proceedings reopened under section 147?
- Whether new scheme shall also cover assessment years prior to assessment year 2021-22?
- Whether "reason to believe" still a prerequisite for reopening ?
- To what extent principle laid down in Kabul Chawla: 380 ITR 573 (Del) is still relevant?
- No explicit provision for abatement of existing assessment proceedings in case of search – Whether dual assessments would continue?
- Limitation in case of search cases shall now be governed by section 153, i.e., dependent on financial year in which the notice under section 148 was served and not on the basis of search authorization (as currently provided in section 153B of the Act).

Reduction of time limit for completing assessment

[Clause 41] **(w.e.f. 01.04.2021)**

- Section 153 of the Act provides for time limit for completion of assessment, reassessment and re-computation

- Section 153(1) prescribed the time-limit for completion of assessment under section 143/ 144 of the Act to be 21 months from the end of the relevant assessment year. This time limit, vide Finance Act, 2017, was reduced to 18 months for AY 2018-19 and 12 months for AY 2019-20 and subsequent assessment years

- Since the assessment procedure is now conducted in a completely faceless and jurisdiction-less way where all internal and external communication is made electronically and physical interface between the taxpayer and the Department has been eliminated, **the time required for completion of assessment proceedings under sections 143 / 144 of the Act is proposed to be further reduced to 9 months from the end of assessment year (for assessment year 2021-22 onwards)**

Allowing prescribed authority to issue notice under section 142(1)(I)

[Clause 33] **(w.e.f. 01.04.2021)**

- Section 142(1)(I) empowers the Assessing Officer to issue notice to an assessee, who has not submitted a return of income, to furnish its return. This is necessary to bring into the fold of taxation non-filers or stop filers who have transactions resulting in income. However, this power can be currently invoked only by the Assessing Officer.

- To further the Government's endeavor to eliminate physical interface between the taxpayer and the Department and to enable centralized issuance of notices etc. in an automated manner, it is proposed to amend the provisions of clause (i) of the sub-section (1) of the section 142 to **empower the prescribed income-tax authority besides the Assessing Officer to issue notice under the said clause.**

Provisional attachment for fake invoices

[Clause 79] **(w.e.f. 01.04.2021)**

- Section 271AAD was inserted vide Finance Act, 2020 to provide for imposition of penalty, on a person or a person who causes such person to make a false entry or omit an entry from his books of accounts, of a sum equal to amount of false or omitted entry

- Section 281B grants powers to the AO to provisionally attach property of an assessee during pendency of an assessment or reassessment

- It is proposed to be amend section 281B to extend the powers of the AO to exercise provisional attachment in cases where penalty proceedings under section 271AAD is pending and penalty of Rs. 2 crore or more is likely to be imposed

Rationalization of provisions of section 143 of the Act

[Clause 34] **(w.e.f. 01.04.2021)**

- The existing provisions section 143(1)(a) provide for processing of return of income after making the adjustments specified in sub-clauses (i) to (vi) therein to the returned total income or loss
- Sub-clause (iv), presently providing for disallowance of expenditure, is proposed to be amended to further allow adjustment on account of increase in income indicated in audit report but not taken into account in computing total income
- Sub-clause (v), presently providing for disallowance of deductions claimed under section 10AA, 80-IA, 80-IAB, 80-IB, 80-IC, 80-ID or section 80-IE, is proposed to be amended to provide for disallowance under section 10AA or under any of the provisions of heading "C.—Deductions in respect of certain incomes" of Chapter VI-A, if the return is furnished belatedly
- The proposed amendment is intended to align the provisions of section 143(1) with section 80AC which prohibits assessees from claiming deductions under heading "C" of Chapter VI-A in case of belated filing of ITR
- Further, the time limit for **issuance of intimation under section 143(1)** has been **reduced from one year to 9 months** from the end of the financial year in which ITR was furnished
- Also, the time limit for **issuance of notice under section 143(2)** has been **reduced from 6 months to 3 months** from the end of the financial year in which ITR was furnished

DISPUTE RESOLUTION

Dispute Resolution Committee

[Clause 66] **(w.e.f. 01.04.2021)**

- New scheme proposed to be inserted under Chapter XIX-AA (section 245MA) to settle new disputes at an early stage to give tax certainty to small and medium taxpayers
- The salient features of the new provisions are as under:
  - The Central Government will constitute one or more Dispute Resolution Committees (DRC)
  - The mechanism of resolution shall be faceless (akin to faceless assessment and appeals)
  - It is optional for the specified persons to opt for the new scheme or to continue to be governed as per regular appeal mechanism
  - Option available to person having total returned income upto Rs.50 lakhs if aggregate variation proposed in specified order is upto Rs.10 lakhs
  - Orders based on search initiated under section 132 or requisition under 132A or survey under 133A or based on information received under an agreement in section 90 or 90A (DTAA) shall not be eligible
  - The DRC shall have powers to **reduce or waive** any penalty imposable under the Act or grant immunity from prosecution for any punishable offence under the Act
- Persons not eligible under the new DRC Scheme:
  - Against whom an order of detention under Conservation of Foreign Exchanges and Prevention of Smuggling Activities Act, 1974 has been made (with certain exceptions)
  - Against whom prosecution for any punishable offence under specified acts has been initiated (e.g. Income tax Act, IPC, Prohibition of Benami Transaction Act, Prevention of Corruption Act, Prevention of Money Laundering Act etc.)
  - Who is notified under section 3 of Special Court (Trial of offences relating to Transaction in Securities) Act 1992

Comments/ Observations:

- Scheme only for small assessee(s)
- An arrangement akin to concept of faceless assessments and appeals is adopted for settlement by way of DRC mechanism
- What is the remedy available against order passed by the DRC?

- Whether order of DRC be challenged only for non–grant of immunity against imposition of penalty and/ or immunity from prosecution?
- Whether opportunity of hearing shall be granted before DRC?

Constitution of the Board for Advance Ruling

[Clauses 67 to 77] **(w.e.f. 01.04.2021)**

- Finance Bill, 2021 has proposed:
  - to amend section 245-O of the Act to provide that the Authority for Advance Rulings (AAR) shall cease to operate from a date notified by the Government
  - to constitute a Board of Advance Ruling (BAR) on a date notified by the Government

Constitution of BAR

- Section 245-OB is proposed to be introduced which will give power to the Government to constitute one or more BARs
- It is proposed that the BAR shall consist of two members, each being an officer not below the rank of Chief Commissioner

Transfer of cases [section 245P and section 245Q]

- To cater to the backlog of cases at the AAR, section 245P and section 245Q are proposed to be amended to provide that all pending applications alongwith all records where
  - no admission order of the AAR has been passed under section 245R(2); or
  - no final order has been passed under section 245R(4)

  will be transferred from the AAR to the BAR

Procedure before BAR [Section 245R]

- It is proposed that section 245R which provides the procedure to be followed by the AAR for admission and pronouncement of the ruling shall apply to the BAR
- It is also proposed that proceedings before the BAR be considered as judicial proceedings for purposes of certain sections of the Indian Penal Code and have certain powers of a civil court as under the Civil Procedure Code

Binding nature [Section 245W]

- Orders passed by BAR shall not be binding on the applicant or the Department and either party may appeal against the order passed by the BAR before the High Court

Grandfathering [Section 245S]

- All previous advance rulings pronounced under section 245R will be been grandfathered and the amendments proposed in the Finance Bill shall not apply to such rulings
- Appropriate amendments to be made to section 245N, 245P, 245R(8), 245T, 245U
- The Central Government may, before 31.03.2023, by notification direct that any of the provisions of the Act shall not apply or shall apply with modifications as specified in the Notification

Comments

- AAR was constituted to avoid dispute in respect of assessment of tax liability and to provide tax certainty
- The AAR pronounces rulings on the applications of the non-resident/residents and such rulings are binding both on the applicants and the Tax department
- As per section 245-O of the Act, persons eligible for appointment as Chairman of AAR are retired judges of the Supreme Court, retired Chief Justice of a High Court or retired Judge of a High Court who has served in that capacity for at least seven years
- The posts of Chairman and Vice-Chairman have remained vacant for a long time due to non-availability of eligible persons
- Although the pronouncements by the AAR should be made within six months of the receipt of the application, however, practically it takes around 5-6 years
- The foreign investor shall be apprehensive in approaching the Board and may view it as a pro-Revenue forum since the Members of the BAR are of the rank of Chief Commissioners
- The rulings by the Board for Advance Ruling shall be non-binding and delivered by the Revenue; this is in line with the global system and is followed in various jurisdictions like USA, UK, Ireland, etc.
- Advance ruling mechanism may still be a chosen mode of dispute resolution to resolve large tax disputes if it can enable them to directly approach the High Court after an unfavorable ruling from the BAR, without having to go through the arduous process of tax assessment process which typically takes 10-15 years
- Given that the time limit of six months for pronouncement of ruling is proposed to be applicable to the BAR, it is hoped that the timeline is strictly followed

FACELESS APPEAL PROCEDURE BEFORE ITAT

Expansion of Faceless Appeals Procedure to ITAT

[Clause 78] **(w.e.f. 01.04.2021)**

- It is proposed to amend the existing provisions of section 255 by inserting sub-section (7) empowering the Central Government to notify a faceless scheme for disposal of appeals by the ITAT.
- The faceless scheme aims at:
  - Promoting efficiency, transparency and accountability
  - **Eliminating** interface between ITAT and the litigants to the extent technologically feasible
  - Introducing dynamic jurisdiction
  - Optimizing utilization of resources through economies of scales and functional specialization
- To facilitate faceless appeal mechanism, the Central Government is also empowered to notify if any provisions of the Act shall not be applicable to the faceless scheme or shall be applicable with exceptions/ modifications.
- The notification shall be issued upto 31st March 2023.

Comments/ Observations:

- Introduction of faceless appeal before ITAT appears to be an expansion/ extension of faceless appeal procedures recently introduced in assessment proceedings, penalty proceedings and the first appellate proceedings.
- Importance of jurisdiction (location) has been given a complete go by.
- What does **"eliminating interface"** mean?
- Whether no opportunity of hearing (physical or virtual) would be granted?

  Or

  Opportunity of hearing shall only be specific request of the parties?

  Or

  Certain parameters would be laid to approve the request of the litigants for personal hearing, if any?

- Whether denial of personal hearing and/ or grant of hearing in limited cases not be violative of the principle of natural justice, i.e., 'one who decides must hear'; and thus unconstitutional?
- Opportunity of oral hearing is normal rule of judicial process and an essential part of principles of natural justice [refer State of Orissa vs. Dr. Binapani Dei and Others: AIR 1967 SC 1296 (SC), CWT vs. Sri Jagdish Prasad Choudhary: 211 ITR 472 (Pat.) (FB), Moser Baer India Ltd vs. Additional CIT: 316 ITR 1 (Del.)].
- Pertinently, faceless scheme for appeal before National Faceless Appeal Center (NFAC) provides that personal hearing shall be subject to: (a) specific request being made; and (b) discretionary approval of such request by CCIT/ DG of Regional Faceless Centre if request covered by circumstances yet to be notified/ prescribed.
- The Delhi High Court has recently admitted a petition challenging the Faceless Appeal Scheme, 2020 in the case of Lakshya Budhiraja v. UOI and others: W.P.(C) 8044/2020 on the ground that request for a personal hearing is at the discretion of the CCIT/ DCIT which is against the provisions of Article 14 of the Indian Constitution.
- Procedures will have to be laid down in respect of, inter alia, filing of appeal, stay applications, additional ground, additional evidences, condonation of delay, miscellaneous application, opportunity of hearing, etc.
- The Government could have waited to introduce faceless mechanism for appeals before ITAT after analyzing success and flaws of recently introduced faceless schemes for assessments and first appellate authority.
- Proposal introduced without any discussion with the stakeholders
- Whether integration of income tax web portal with ITAT website will be done for seamless adoption of electronic procedures?

INCOME TAX SETTLEMENT COMMISSION

Discontinuation of Settlement Commission

[Section 245A to 245M]

[Clauses 54 to 65] **(w.e.f. 01.02.2021)**

- Income Tax Settlement Commission (ITSC) was set up in the year 1976 on the recommendation of Direct Tax Enquiry Committee headed by former Chief Justice of India, Shri K. N. Wanchoo.
- The objective of setting up of ITSC was to settle the tax liabilities in complicated cases, avoiding endless and prolonged litigation, in a time bound manner of 18 months.
- Presently, the taxpayer could approach the ITSC during the pendency of assessment proceedings, primarily to avail the benefit of immunity from penalty and prosecution.
- ITSC was once in lifetime opportunity for the taxpayer.
- Finance Bill, 2021, proposes to discontinue ITSC w.e.f. 01.02.2021, the date of presentation of Finance Bill.
- No application under section 245C of the Act for settlement of cases to be made on or after 1st February, 2021.
- Interim Board of settlement is proposed to be constituted for adjudication of 'pending cases'.
- Proposed "Interim Board" as per section 245AA to consist of three members, each being an officer of the rank of Chief Commissioner, nominated by the Board.
- The proposed provision provides that in case of difference of opinion among the members on any point, the said point shall be decided according to the opinion of majority.
- Consequential amendments proposed in section 245DD, 245F, 245G and 245F to provide that the powers and functions of Settlement Commission shall be exercised by the Interim Board.
- Date on which application is allotted/transferred to Interim Board to be deemed as date when application made under section 245C.
- Various provisions of section 245D made applicable to pending applications allotted to Interim Board.
- Section 245M is proposed to be inserted to provide option for withdrawal of pending application:

a) Option to withdraw pending applications within a period of 3 months from the date of commencement of the Finance Act, 2021 and intimate the assessing officer;

b) In case option to withdraw the application is not exercised then application deemed to have been received by the Interim Board.

- In case of withdrawal, the assessing officer shall dispose off the case as if no application under section 245C of the Act had been made.
- The proposed provisions specifically provide that any material/ information produced by the assessee before the ITSC or the results of the inquiry held or evidence recorded by the ITSC **cannot** be used by the income tax authority.
- It is proposed that the Central Government shall make a scheme for the purpose of settlement of pending applications by eliminating the interface between the Interim Board and the assessee.

Comments/ Observations

- Zero tolerance policy of Government towards tax evasion is evident from the proposed suspension of ITSC.
- Discontinuation of ITSC would result in no recourse to assessee's who want to compromise or settle tax disputes and avoid penalties and prosecution, especially search cases.
- Transfer of pending applications to Interim Board may severely prejudice interest of assessee's who had opted to settle tax disputes to buy peace.
- Intent of constitution of 'Interim Board' questionable when very same powers and functions of ITSC proposed to be vested in Interim Board .
- On withdrawal of application, assessing officer can use material/ information collected in any proceedings irrespective of whether such information was produced before the ITSC.
- Scope of word 'inquiry' not defined, providing free hand to assessing officer now.
- Whether forthwith suspension of ITSC is open to challenge in the Courts, particularly in the light of the decision of various courts, including SC in UOI V. Star Television New Ltd: [2015] 231 Taxman 341 (SC), in the context of automatic abatement of old ITSC matters by the Finance Act, 2007?

TAX DEDUCTION AT SOURCE (TDS)

TDS u/s 194 on dividend income

[Clause 44] **(w.r.e.f. 01.04.2020)**

- Finance Act, 2020, introduced a paradigm shift in the scheme of taxation of dividend income by abolishing Dividend Distribution Tax ('DDT') under section 115-O of the Act and imposing liability on the shareholders to pay tax at the applicable rates on the dividend income received.
- Consequently, section 194 was amended to impose obligation on the company paying dividend to deduct tax at source from the dividend to be distributed/ paid to a shareholder, who is resident in India.
- It is proposed to amend second proviso to section 194 of the Act to provide that in addition to dividend credited or paid to certain insurance companies or insurers, the provisions of this section shall not apply to the following:
  i. dividend credited or paid to a business trust, as defined in section 2(13A), viz., InvIT & REIT, by a special purpose vehicle referred to in Explanation to section 10(23FC), or
  ii. payment of dividend to any other person as may be notified.

TDS on payment for purchase of goods

[Clause 48 and 50] **(w.e.f. 01.07.2021)**

- It is proposed to insert new provision, viz., section 194Q to provide for deduction of tax at source by **any buyer** who is responsible for paying any sum **to resident seller for purchase of any goods of the aggregate value exceeding Rs. 50 Lakhs in any previous year**, at the time of credit or payment, whichever is earlier, at **an amount equal to 0.1% of sum exceeding RS. 50 lakhs.**
- "Buyer" for this section means a person whose total sales, gross receipts or turnover from the business carried on by him exceed Rs.10 Crores during the financial year immediately preceding the financial year in which the purchase of goods is carried out.
- Further, the provisions will not apply to the following–
  - Where TDS is deductible under any other provisions; and
  - Where TCS is collectible under any other provisions other than section 206C(1H)
- Consequential amendment has been made in section 206AA to provide that in case where TDS is required to be deducted under section 194Q and the seller does not have a PAN, then the buyer will be liable to deduct tax at source at a higher rate of 5%.

Comment / Observations:

- Purchase transaction hitherto were outside the ambit of tax deduction at source mechanism. However, the said scope has been expanded by earlier introducing section 206(1H), now imposing additional burden on the buyer to deduct TDS for purchase of goods.
- By the virtue of proviso to section 206(1H), if the transaction is subject to TDS under section 194Q, then such transaction will be outside the ambit of TCS.

TDS/TCS on Non-Filers of Income Tax Returns

[Clause 51 and 52] **(w.e.f. 01.07.2021)**

- It is proposed to insert two new sections (i.e., 206AB and 206CCA) in the Act as special provisions providing for higher rate for TDS / TCS (i.e. twice the rate under the Act or 5%, whichever is higher) for the non-filers (specified persons).
- Specified person means a person who has not filed ITRs for both of the two assessment years relevant to the two financial years which are immediately before the previous year in which tax is required to be deducted or collected within the time prescribed under section 139(1) and the aggregate TDS/TCS in his/her is Rs.50,000 or more.
- If the assessee do not have PAN then the rate higher of the (a) rate prescribed under section 206AA and (b) rate prescribed under section 206AB will be applicable.
- The provisions will not apply to the following–
  - where the tax is required to be deducted under sections 192, 192A, 194B, ?194BB, 194LBC or 194N; and
  - the specified person shall not include a non-resident who does not have a permanent establishment in India

Comment / Observations:

- The proposed amendment increases the compliance burden on the assessee in as much as that the deductor / collector is now required to obtain or verify the income tax returns filed by the payee even in the cases where ITRs would not have been filed due to other reasons.
- In order to avoid the higher rate of TDS, it is now obligatory on the part of the assessee to file the ITR under section 139 (1) of the Act.

- In case of the non-resident having Permanent Establishment in India, and such non-residents do not have either PAN or did not file the ITR then the tax will be deducted at substantially higher rates.

TDS u/s 196D on dividend income of FIIs

[Clause 49] **(w.e.f. 01.04.2021)**

- Section 196D of the Act provides for deduction of tax at source @ 20% on income of FII from securities as referred to in section 115AD(1)(a) of the Act (other than interest referred in section 194LD of the Act).
- Unlike section 195, section 196D does not provide for deduction of tax at 'rates in force', which is defined in section 2(37A) of the Act to include tax rates provided in DTAAs entered into under section 90 or notified under section 90A; thereby requiring deduction of tax at higher rate of 20%.
- Hon'ble Supreme Court in the case of PILCOM vs CIT: [2020] 425 ITR 312 (SC) held that payer cannot apply rates prescribed under the relevant DTAAs for TDS on payments to non-residents where the Act contains provisions providing for specific TDS rates on such payments.
- It is, accordingly, proposed to insert a proviso to section 196D(1) to provide that in case of a payee to whom DTAA applies and such payee has furnished the tax residency certificate referred to in section 90(4)/ section 90A(4) of the Act, then the tax shall be deducted @ 20% or rate of income-tax provided in DTAA for such income, whichever is lower.

Comments/ observations

- In terms of the extant provisions of section 196D, as also clarified by the Hon'ble Supreme Court judgment in PILCOM (supra), FIIs would suffer TDS on dividend income at higher rate of 20% and thereafter, be required to claim eligibility of lower rates under the respective DTAAs by filing return of income and claiming refund of additional tax deducted in India, if any.
- The aforesaid amendment is a welcome move, removing the higher tax burden imposed on FIIs, which ultimately would have been refundable to them, thereby also leaving more money in their hands to invest in India.

COMPLIANCE

Payment of employee's contribution to a fund after due date – not allowable as deduction

[Clauses 8 and 9] **(w.e.f. 01.04.2021)**

- Section 2(24)(x) provides that any sum received by the assessee from employees as contribution to any provident fund, etc., will be considered as income
- Under clause (va) of Section 36(1), deduction of aforesaid contribution is allowed in the hands of employer provided the same is credited to the employees' account in the relevant fund on or before the due date under the respective statute (eg. PF Act.)
- Section 43B provides that sum payable by assessee as an employer by way of contribution to any PF, ESI, etc., shall be allowed ad deduction on payment basis. Liability for the relevant previous year is allowed if the same is deposited/ paid on or before the due date of furnishing of return of income for that year
- Various Courts have held that both employer and employees' contribution deposited after the 'due date' specified in PF/ESI laws but before the date of furnishing of return of income would be allowed as deduction in terms of section 36(1)(va) read with section 43B:
  - CIT vs. Vinay Cement Ltd: 213 CTR 268 (SC)
  - PCIT v. Rajasthan State Beverages Corporation Ltd.: 250 Taxman 16 (SC)
  - CIT vs. AIMIL Ltd: 321 ITR 508 (Del.)
  - CIT vs. P.M. Electronics Ltd: 313 ITR161 (Del.)
  - CIT v. Ghatge Patil Transports Limited: 368 ITR 749 (Bom.)
  - Spectrum Consultants India (P) Ltd. v. CIT: 215 Taxman 597 (Kar.)
- Contrary view has, however, been taken in following decisions holding that deduction on account of employees' contribution can be allowed only if deposited within the due date prescribed under the relevant statute and not otherwise:
  - CIT v. Bharat Hotels Limited: 410 ITR 417 (Del)
  - CIT v. Gujarat State Road Transport Corporation: 366 ITR 170 (Guj.)
  - PCIT v. Suzlon Energy Ltd. : 115 taxmann.com 340 (Guj.)
  - Checkmate Facility & Electronic Solutions (P.) Ltd. v. DCIT: Tax Appeal No. 1256 of 2018 (Guj.)

- Circular No.22/ 2015 issued by CBDT

✦ To put the aforesaid controversy to rest, it is proposed to amend section 36(1)(va) and section 43B of the Act to provide that deduction of employees' contribution shall be allowed only if the same is credited by the employer to the employee's account in the relevant fund on or before the due date prescribed under the relevant Act

Comments/ Observations:

✦ The amendment effectively nullifies the decisions which allowed employee' contribution deduction on payment basis under section 43B of the Act

✦ Contrary to the proposed amendment, letter dated10th September 2018 of Pr. DGIT (Legal and Research) suggested acceptance of the decisions in favour of the taxpayer and withdrawal/ non-contestation of pending appeals on the said issue.

✦ While the amendment is expressly stated to be applicable for AY 2021-22 and subsequent years, the text of explanations inserted in section 36(1)(va) and 43B, however, states, **"…do not apply and deemed to have never applied…",** which may be argued by the Revenue to be merely clarificatory and hence applicable retrospectively.

✦ Considering that the amendment is expressly stated to be applicable prospective, whether it can be argued that for years prior to AY 2021-22, employees' contribution be allowed as deduction on payment basis under section 43B?

✦ The proposed amendment appears to be very harsh since even one day delay shall result in complete denial of deduction.

✦ The employers will have to ensure strict and timely compliance of labour laws to be able to claim deduction(s)

Rationalisation of provisions relating to tax audit in certain cases

[Clause 11] **(w.e.f. 01.04.2021)**

✦ Section 44AB of the Act requires every person, carrying on business with total sales, turnover or gross receipts exceeding Rs. 1 crore and every person carrying on profession with gross receipts exceeding Rs. 50 lakh, in the previous year to get his accounts audited and furnish such audit report by the due date as specified under section 139(1)

✦ In order to minimize compliance burden on SME's, vide Finance Act, 2020, the aforesaid threshold of Rs.1 crore for a person carrying on business was increased to Rs. 5 crores subject to the following conditions:

- aggregate of all receipts in cash during the previous year does not exceed five per cent of total receipts; and
- aggregate of all payments in cash during the previous year does not exceed five per cent of total payments

✦ The aforesaid threshold is proposed to be further increased to Rs. 10 crores w.e.f. assessment year 2021-22 124

Change in due dates for filing income tax returns

[Clause 32] **(w.e.f. 01.04.2021)**

✦ Provisions of section 139 are proposed to be amended to provide for the following revised timelines for filing of income tax returns (assessment year 2021-22 onwards):

Assessee/ Type of ITR	Due date (Present)	Due Date (Proposed)	Reason
Spouse of partner of partnership firm whose accounts are required to be audited, if section 5A applies to such spouse	31st July/ 31 st October of AY	31 st October of AY	Due dates for partner and spouse have been aligned to facilitate correct apportionment of income under section 5A
Partner of a partnership firm which is required to furnish Form 3CEB	31 st October of AY	30 th November of AY	Total income of such partner can be determined only after books of the firm are finalised. Hence, ROI due dates have been aligned.
Belated return u/s 139(4)	End of relevant AY (i.e. 31st March) or completion of assessment, whichever is earlier	3 months before end of relevant AY (i.e. 31st December) or completion of assessment, whichever is earlier	Due to technological upgrades, Department's processes are becoming faceless and jurisdiction-less and the time taken to conduct and complete such processes has greatly reduced
Revised return u/s 139(5)			

- Section 139(9) lays down procedure to cure a defective ITR. The Explanation to the sub-section lists certain conditions non-fulfillment of which renders an ITR defective. Due to large number of returns becoming defective by application of the said conditions, a proviso is proposed to be inserted to the said Explanation empowering CBDT to relax/ modify applicability of such conditions.

Advance Tax Installment on Dividend Income

[Clause 53] **(w.e.f. 01.04.2021)**

- Section 234C provides for levy of interest @ 1% per month for shortfall in payment of advance tax
- First proviso excludes shortfall on account of irregular incomes such as capital gains, lottery, card games, races, etc.
- Since dividend income is now taxable in the hands of shareholders and the same cannot be ascertained in advance, dividend [excluding dividend u/s 2(22)(e)] is also proposed to be included in exclusions provided in first proviso.
- Accordingly, dividend is only to be considered while paying advance tax installments falling after the period when the same is declared

TAXATION OF TRUSTS/ PUBLIC INSTITUTIONS/ EDUCATIONAL INSTITUTIONS

Extending benefit under section 10(23C)

[Clause 5] **(w.e.f. 01.04.2022)**

- Under the existing provisions of sub-clause (iiiad) and (iiiae) to section 10(23C), the income received by any university/ other educational institution/ any hospital existing solely for educational/ philanthropic purposes and not for the purpose of profit are exempt if the annual receipts do not exceed Rs.1 Crore. [Refer Rule 2BC of the Rules]
- To incentivize and widen the ambit of aforesaid exemption, it is proposed to enhance the ceiling limit of annual receipts from Rs.1 crore to Rs. 5 crores.
- This would help various institution having annual receipts upto Rs.5 crore to avail benefit of exemption under section 10(23C)

Utilization of corpus not allowed as application

[Clause 5 & 6] **(w.e.f. 01.04.2022)**

- Under the existing provisions, the voluntary donations received by charitable institutions with the specific direction to form part of corpus are fully exempt [refer section 11(1)(d)]. Similar is the situation for institutions exempt u/s 10(23C) [Refer explanation to third proviso]
- As regards other voluntary donations, the same are exempt under section 11(1)(a)/10(23C) subject to minimum of 85% application for charitable purposes in India
- In cases where application falls short of 85%, the trust can accumulate the shortfall under section 11(2) to be applied in next five years. Such accumulation has to be kept in modes specified under section 11(5)
- Presently, there is no specific requirement to invest **corpus funds** in modes specified under section 11(5). As a result, considering that money is fungible, a situation could arise, where the fund received for corpus is utilized for application of income earned during the year.
- This could potentially result in double deduction/exemption of both corpus donation and application of income.
- In order to overcome the aforesaid situation of double deduction, it is proposed to amend section 11(1)(d) to provide that corpus donations received shall be exempt only if the trust invests such contributions in the modes prescribed under section 11(5).

- It is further provided that application made by utilizing corpus funds shall not be treated as application of income for the purposes of section 11(1)(a)/(b) in the year of application. The same will be treated as application only in the year in which the same amount is invested back in the modes prescribed under section 11(5) maintained specifically for such corpus.

Illustration:

Particulars	Presently	Proposed
General contributions	Rs.200	Rs.200
Corpus Donation	Rs.100	Rs.100
Total Available Funds	Rs.300	Rs.300
Less: Application of Funds	Rs.250*	Rs.250
Less: Exemption of corpus	Rs.100	NIL**
Total exemption / application	Rs.350	Rs.200 [Rs 50*** expended out of corpus, not allowed]
Surplus/(Deficit)	(Rs.50)	Rs.100

* *Rs. 200 out of General Contribution and Rs. 50 out of corpus fund*

** *Not invested in the modes prescribed under section 11(5).*

*** *Rs.50 will be allowed as application, when invested in the prescribed modes in any succeeding year.*

- It is advised that trust maintains separate investments funds as prescribed under section 11(5) for corpus donations. Receipt of corpus donation and its application must be tracked (identified)
- The amended provisions will delay allowability of expense as application from the year of incurrence to year in which corpus is recouped
- The amendment covers entities claiming exemption under section 10(23C) and sections 11/12.

Utilization of loan funds- to be allowed as application only in year of repayment of loan

[Clause 5 & 6] **(w.e.f. 01.04.2022)**

- Presently, repayment of loan by a charitable trust is allowed as application of income [Refer DIT vs. Span Foundation : 178 Taxman 436 (Del HC), CIT v. Janmabhoomi Press Trust : 242 ITR 703 (Kar HC), DIT(E) v. Govindu Naiker Estate : 315 ITR 237 (Mad HC), Circular No. 100 dated 24.01.1973]
- It is stated that in certain cases, the taxpayer can claim double application/ deduction – (i) once on incurrence of expenditure; and (ii) again on repayment of loan

- In order to eliminate such double deduction/ application of income, it is proposed to provide that application made out of loan funds shall not be treated as application in the year of borrowing/ incurrence of expenditure. The same will be treated as application only in the year in which such loan is repaid by the charitable trust

Particulars	Presently	Proposed
General contributions	Rs.200	Rs.200
Total Income	Rs.200	Rs.200
Less: Application of Funds	Rs.250*	Rs.250
Total application	Rs.250	Rs.200**
Surplus/(Deficit)	(Rs.50)	-

* *Rs. 50 financed from borrowings.*

** *Application restricted to Rs.200; since Rs.50 were utilized from borrowings, the same shall be allowed as application in the year in which such borrowings are repaid.*

- It is advised that accounts should be maintained in such a way that receipt of loans, expenses incurred from loan funds can be tracked (identified)
- The amended provisions will delay allowability of expense as application from the year of incurrence to year in which loan is repaid
- The amendment covers entities claiming exemption under section 10(23C) and sections 11/12

Restriction of excess application in one year to be set off in subsequent year

[Clause 5 & 6] **(w.e.f. 01.04.2022)**

- It has consistently been held by the Courts that income derived from the trust property is to be computed on commercial principles; the trust are entitled to carry forward excess expenditure incurred during the year over its income to subsequent year and set-off the same against receipts of subsequent year(s) [Refer CIT (E) vs. Subros Educational Society: 303 CTR 1 (SC), DIT v. Raghuvanshi Charitable Trust: 197 Taxman 170 (Del), ITO (E) vs. Dr. Bhai Mohan Singh Foundation ITA No. 6249/Del/2017 (Delhi Trib.)]
- An amendment has been proposed in section 10(23C) and section 11 to provide that set-off of excess expenditure incurred in any preceding year shall not be allowed against the current year's income.
- The amendment seeks to reverse the decisions of abovementioned various Courts.

TAXATION OF INDIVIDUALS

Section 194P – Relaxation from filing ITR for specified senior citizens

[Clause 47] **(w.e.f. 01.04.2021)**

- A new section 194P is proposed to be inserted w.e.f. 01.04.2021 which requires 'specified banks' (to be notified later) to deduct tax at source on pension and/ or interest payments made to 'specified senior citizens' after giving effect to deductions allowable under Chapter VI-A and rebate under section 87A of the Act
- If appropriate taxes have been withheld at source by the specified banks, the specified senior citizens would not be required to furnish income tax return under section 139 of the Act
- 'Specified senior citizens' means an individual resident who:
  - i. is of age 75 years or above;
  - ii. only derives income by way of pension and additionally interest income from any account maintained with the specified bank wherein pension is received;
  - iii. has furnished declaration to the specified bank in the manner as may be prescribed 139

Cash Allowance in lieu of LTC- Exemption

[Clause 5] **(w.e.f. 01.04.2021)**

- Section 10(5) provides exemption of amount received towards Leave Travel Concession (LTC) by an employee from his employer
- Due to the COVID-19 pandemic, employees have not been able to avail of LTC in the current block of 2018-21
- To provide relief to such employees, said section is proposed to be amended to provide exemption in respect of cash allowance received in lieu of LTC, subject to certain conditions to be prescribed in rules
- One such condition is that the assessee or member of his family purchases goods of avails services which attract GST rate of 12% or more from GST registered vendor during the period 12.10.2020 to 31.03.2021.
- Exemption shall not exceed INR 36000 per person or 1/3 of specified expenditure
- Exemption is available only for AY 2021-22

Overseas Retirement Fund

[Clause 28] **(w.e.f. 01.04.2022)**

- Withdrawal from overseas retirement funds by residents in India, which funds were opened while being non-residents in India and residents in foreign countries, is taxable in India on accrual basis and the same may be taxed on receipt basis in the foreign country.
- In order to address this mismatch and remove the genuine hardship, it is proposed to introduce section 89A to provide that the income of a specified person from specified account shall be taxed in the manner and in the year as prescribed by the Central Government.
- Explanation to the proposed section 89A shall provide the following definitions:
  - 'specified person' - person resident in India who opened a 'specified account' in 'notified country' while being non-resident in India and resident in that country.
  - 'specified account' - account maintained in 'notified country' by 'specified person' in respect of his retirement benefits and income from such account is not taxable on accrual basis but is taxed on receipt basis in such notified country
  - 'Notified country' - country as may be notified by Central Government in the Official Gazette for the purpose of this section.

Comments/ observation

- The proposed amendment would ensure that benefit of Foreign Tax Credit is not denied in respect of taxation of withdrawal from overseas retirement funds, to such specified person who has suffered taxation on the same income in foreign country and in India.
- Rules regarding manner and year of taxation shall be notified in due course for removal of hardship of double taxation.

Unit Linked Insurance Policy (ULIP)

[Clause 5] **(w.e.f. 01.04.2021)**

- As per existing provisions of section 10(10D), sum received under a life insurance policy, including the sum allocated by way of bonus, in respect of which premium payable for any of the years during the terms of the policy does not exceed ten percent of the actual capital sum assured is exempt
- Thus, under existing provisions, maturity proceeds from ULIP are tax free irrespective of the premium paid by the assessee

✦ To rationalize the taxation of proceeds from ULIPs, following amendments have been proposed:

- 4th Proviso inserted – maturity proceeds of ULIPs issued on or after 01.02.2021, with annual premium for any year during the term of policy exceeds Rs.2.5 lakhs, shall be taxable
- 5th Proviso inserted- where premium is payable for more than one ULIPs issued on or after 01.02.2021, then exemption shall be available only for those ULIPs whose aggregate amount of premium does not exceed Rs.2.5 lakhs for any of the previous years during the term of any of the policy
- 6th Proviso inserted- amount/ sum received on death of a person continues to be exempt regardless of premium paid/ payable
- 7th Proviso- CBDT may issue guidelines after approval from Central Government which shall then be laid before the Parliament.
- Explanation 3 inserted which defines ULIP as 'life insurance policy which has components of both investment and insurance and is linked to a unit as defined under the Insurance Regulatory and Development Authority of India (Unit Linked Insurance Products) Regulations, 2019 dated the 8th day of July, 2019

[Clause 14] **(w.e.f. 01.04.2021)**

✦ Sub-section (1B) is proposed to be inserted in section 45 which provides for taxation of profit and gains arising from redemption of ULIP [to which section 10(10D) does not apply on account of the applicability of the fourth and fifth proviso] as capital gains on receipt basis, which shall be calculated in the manner to be prescribed

[Clause 3] **(w.e.f. 01.04.2021)**

✦ Section 2(14) [Capital asset] is proposed to be amended to include ULIP issued on or after 01.02.2021 under definition of capital asset, if annual premium payable or aggregate of premium payable against ULIP for any previous year during the term of the policy exceeds Rs.2.5 lakhs

[Clause 29] **(w.e.f. 01.04.2021)**

✦ ULIPs are proposed to be included in the definition of equity-oriented funds and thus provisions of section 111A (15% tax on STCG) and 112A (10% tax on LTCG) shall apply on sale / redemption of such ULIPs, subject to eligibility conditions in such section

Comments/ Observations:

✦ With the proposed amendment, taxation of ULIP with annual premium exceeding Rs.2.5 lakh is treated at par with mutual funds (equity oriented)

- Proposed insertion of sub-section (1B) in section 45 defers the taxation on redemption of ULIPs to the year of receipt of money. Being so, if policy is redeemed in a year, while the proceeds are received by the holder in any subsequent year, the tax implication shall arise in the year of receipt
- With the proposed amendments, certainty has been provided that gains from ULIPs shall be taxable under the head 'income from capital gains' only [and not under any other head]

Taxability of interest on PF/ PPF/ EPF a/c

[Clause 5] **(w.e.f. 01.04.2022)**

- Section 10(11) provides exemption from taxation of interest earned on deposits in Provident Fund and Public Provident fund. Section 10(12) provides exemption in respect of accumulated balance due and becoming payable to an employee from recognised Provident Fund to the extent provided in rule 8 of Part A of Fourth Schedule.
- With the intent to tax the income earned by persons or employees who contribute large sums to such funds and then claim exemption under section 10(11)/ 10(12), it is proposed to introduce a cap on the maximum yearly contribution, income arising on which will be exempt.
- It is proposed to introduce a proviso in section 10(11) and 10(12) of the Act to provide that exemption shall not be available on interest accrued in the account of a person during the previous year, to the extent it relates to the amount or aggregate of amounts contributed by such person exceeding Rs.2.5 lakhs in a previous year in that fund.

Comments/ observations

- The proposed amendment does not restrict the deposit in such funds, rather it intends to tax the interest earned by persons contributing large sums to these funds.
- The aforesaid amendment may have potential impact on employees in higher tax slab or employees making large voluntary contributions in Employee Provident Fund.
- As per the proposed amendment, income by way of interest on contribution in a previous year upto Rs.2.5 lakhs shall remain exempt, however, interest corresponding to contribution in excess of Rs.2.5 lakhs shall be taxable.
- Manner of computation of exemption shall be prescribed in due course.

AFFORDABLE HOUSING

Section 80EEA – Extension of time limit for sanctioning of loan for affordable housing

[Clause 24] **(w.e.f. 01.04.2022)**

- Under the existing provisions of section 80EEA, deduction of interest on loan borrowed from a financial institution for purpose of acquisition of residential house property (affordable houses) is available, upto a maximum Rs.1,50,000, subject to the condition that the said loan should be sanctioned by the financial institution during the period beginning from April 1, 2019 to March 31, 2021.

- In order to continue promoting purchase of affordable housing and to incentivize first time buyers to invest in residential property, the period of sanctioning of loan is proposed to be extended from March 31, 2021 to March 31, 2022.

MISCELLANEOUS

Facilitating strategic disinvestment of public sector company

[Clauses 3 and 22] **(w.e.f. 01.04.2021)**

- Section 2(19AA) defines "demerger" in relation to companies to mean transfer, pursuant to a scheme of arrangement under sections 391 to 394 of the Companies Act, 1956 (1 of 1956), by a demerged company of its one or more undertakings to any resulting company on satisfaction of conditions prescribed in the said clause.

- Section 72A of the Act provides provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc.

- It is proposed to relax the provisions of the above two sections for public sector companies in order to facilitate strategic disinvestment by the Government. Accordingly, it is proposed to -

  - amend section 2(19AA) by inserting Explanation 6 to clarify that the reconstruction or splitting up of a public sector company into separate companies shall be deemed to be a demerger, if –

    - such reconstruction or splitting up has been made to transfer any asset of the demerged company to the resultant company; and

    - the resultant company is a public sector company on the appointed date indicated in the scheme approved by the Government or any other body authorised under the provisions of the Companies Act, 2013 or any other Act governing such public sector companies in this behalf; and

    - fulfils such other conditions as may be notified by the Central Government in the Official Gazette.

  - amend clause (c) of section 72A(1) to provide that the provision of said section shall also apply in case of amalgamation of one or more public sector company or companies with one or more public sector company or companies;

  - insert clause (d) to provide that the provision of the said section shall also apply in case of amalgamation of an erstwhile public sector company with one or more company or companies, if

    - the share purchase agreement entered into under strategic disinvestment restricted immediate amalgamation of the said public sector company; and

- the amalgamation is carried out within five year from the end of the previous year in which the restriction on amalgamation in the share purchase agreement ends.

- insert proviso to section 72A(1) to provide that the accumulated loss and the unabsorbed depreciation of the amalgamating company, in case of an amalgamation of an erstwhile public sector company with one or more company or companies which is deemed to be loss or, as the case may be, allowance for unabsorbed depreciation of the amalgamated company shall not be more than the accumulated loss and unabsorbed depreciation of the public sector company as on the date on which the public sector company ceases to be a public sector company as a result of strategic disinvestment;

- insert an Explanation to section 72A to define the terms -

  - "control" (same as defined in section 2(27) of the Companies Act, 2013),

  - "Erstwhile public sector company" (public sector company in earlier previous years which ceases to be public sector company by way of strategic disinvestment by the Government); and

  - "Strategic disinvestment" (sale of shareholding by the Central Government or any State Government in a public sector company which results in reduction of its shareholding to below 51%, alongwith transfer of control to the buyer).

INCOME DECLARATION SCHEME (IDS)

INCOME DECLARATION SCHEME (IDS)

[Clause 159] **(w.r.e.f. 01.06.2016)**

- The Income Declaration Scheme, 2016, introduced by FA, 2016, provided an opportunity to the persons who had not disclosed any income in the past to come clean and make payment of tax, surcharge and penalty as per the provisions of the Scheme. The Scheme commenced on 01.06.2016.
- Section 191 of FA, 2016, inter alia, provides that any amount of tax, surcharge and penalty paid in pursuance of a declaration made under the Scheme shall not be refundable.
- A proviso was inserted in section 191 vide Finance (No. 2) Act, 2019 empowering the Board to specify a class of persons to whom such tax paid in excess shall be refundable.
- It is now proposed to retrospectively amend the aforesaid proviso to provide that the excess amount would be refunded to the specified class of persons **without payment of any interest.**

AMENDMENTS TO VIVAD SE VISHWAS- EXCLUSION OF WRITS/ SLPs AGAINST SETTLEMENT COMMISSION ORDERS

Writs/ SLP against ITSC order barred from settlement under VsV Scheme

[Clause 160] **(w.r.e.f. 17.03.2020)**

- The Direct Tax Vivad se Vishwas Act, 2020 (the VsV Act) was enacted on 17thMarch 2020 with an objective "to reduce pending income tax litigation, generate timely tax revenue for the Government and benefit taxpayers by providing them peace of mind, certainty and savings on account of time and resources that would otherwise be spent on long-drawn and vexatious litigation process"
- Under section 2(1)(a) of the VsV Act, "appellant', inter alia, means an assessee in whose case an appeal or writ petition has been filed either by the assessee or by the Revenue before an appellate forum and is pending as on 31.01.2020
- Under section 2(1)(b) of the VsV Act, "appellate forum" means the Supreme Court, High Courts, the Income Tax Appellate Tribunal or the Commissioner of Income Tax (Appeals) ('CIT(A)')
- Section 9 of VSV Act provides exhaustive list of prohibited categories of cases not entitled for benefit under the Scheme
- VSV Act did not exclude writ/ SLP pending before the High Court/ Supreme Court against the order passed by Income Tax Settlement Commission (ITSC)
- Vide Circular No. 21 dated 04.12.2020 (FAQs) issued by the CBDT, it was cryptically clarified that proceeding before ITSC or writs filed against ITSC orders are not eligible to avail benefit of settlement under VsV Act (FAQ No. 63)
- The Finance Bill now proposes to give statutory recognition to the aforesaid FAQ inasmuch as Explanations are proposed to be inserted under definitions of 'appellant', 'disputed tax' and 'tax arrears' to the effect that any writ or SLP or other proceedings arising out of order passed by ITSC shall not be included and be deemed to have never been included for settlement under the VSV Act
- Amendments made applicable retrospectively w.r.e.f 17th March 2020

Comments/ Observations:

- The Memorandum states that the VsV Act was not intended to cover cases where assessee skipped regular assessment procedure and approached ITSC for settlement under the provisions of the Act
- Pertinently taxpayer's challenge against FAQ No.63 denying benefit of settlement under the VSV Act writs against the ITSC order is presently sub -judice before the Delhi High Court
- Whether the proposed retrospective amendment takes away the vested right of the taxpayer and to what extent the same would be open to challenge in the Court(s)?

THE PROHIBITION OF BENAMI PROPERTY TRANSACTION ACT, 1988

Amendments to the Prohibition of Benami Property Transaction Act, 1988

[Clauses 142 to 147] **(w.e.f. 01.07.2021)**

- The existing provisions of Prohibition of Benami Property Transaction Act, 1988 ('PBPT Act') provides for appointment of Adjudicating Authorities to exercise jurisdiction, powers and authority conferred under the Act [Section 7].
- Finance Bill, 2020 has proposed to substitute section 7 to provide that the Competent Authority constituted under section 5(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) shall be the Adjudicating Authority under the PBPT Act which shall commence functioning from 01.07.2021.
- Section 8 to 17 of PBPT, which provides for composition and constitution of adjudicating authority, is proposed to be omitted by the Finance Bill, 2021 considering that no separate adjudicating authority would now be constituted under PBTP Act. Consequential amendments have also been made in section 68.
- In order to ensure smooth transition, it has been proposed that where the time limit for passing the order by Adjudicating Authority expires during the period 01.07.2021 and 29.09.2021, the time limit for passing such order shall stand extended to 30.09.2020.

INDIRECT TAX

CENTRAL GOODS AND SERVICES TAX ACT, 2017

Legislative Changes

Amendments under CGST Act:

[Clauses 99] **(w.r.e.f. July 2017)**

- Sec. 7(1) amended to insert new clause (aa) to include activities or transactions involving supply of goods or services by any person, other than an individual, to its members or constituents or vice – versa within the scope of 'supply'. Such transactions liable to GST irrespective of whether it is for cash, deferred payment or other valuable consideration
- Explanation inserted to clarify that the person, its members and its constituents shall be deemed to be two separate persons and such supply shall be deemed to take place from one person to another
- Para 7 of Schedule II omitted which provides for supply of goods from unincorporated associations or body of persons to a member thereof to be treated as supply of goods

[Clause 100, 101,102] **(w.e.f. 1st April 2021)**

- New clause (aa) inserted to Sec. 16(2) to allow ITC only when details of underlying invoice or debit note is appearing in the outward supplies of the said supplier and such details have been communicated to the recipient of such invoice or debit note
- Sub-sec (5) of Sec. 35 proposed to be omitted so as to remove the mandatory requirement of getting annual accounts audited by specified professionals
- Sec. 44 being amended to provide for submission of annual return in Form GSTR-9 on self-certification basis. Further, Commissioner empowered to exempt a class of taxpayers from the requirement of filing annual return

[Clause 103] **(w.r.e.f. July 2017)**

- Proviso (1) to Sec. 50 being substituted to charge interest on net cash liability

✦ [Clause 104 to 112]

Section reference	Amendments
Sec. 74	Seizure and confiscation of goods and conveyances in transit is proposed to be treated as a separate proceeding from recovery of tax
Sec. 75(12)	Explanation being inserted to clarify that "self-assessed tax" shall include tax payable in respect of outward supplies, the details of which have been furnished under Sec. 37, but not included in the return furnished under Sec. 39
Sec. 83	The Section is being amended to provide that provisional attachment shall remain valid for the entire period starting from the initiation of any proceeding under till the expiry of a period of one year from the date of order made thereunder.
Sect. 107(6)	A proviso is being inserted to provide that an appeal shall be filed against an order made under sub- Section (3) of Section 129, only on payment of a sum equal to twenty-five per cent of the penalty levied.
Sec. 129 / 130	Amendment being made to delink the proceedings under Sec. 129 relating to detention, seizure and release of goods and conveyances in transit, from the proceedings under Sec. 130 relating to confiscation of goods or conveyances and levy of penalty
Sec. 151 r/w 168	Sec. 151 being amended to empowerJurisdictional Commissioner to call for information from any person relating to any matter dealt with in connection with CGST Act. Similarly, Sec. 168 being amended to enable the Jurisdictional Commissioner to exercise such powers
Sec. 152	Amended to provides that no information obtained under Sec. 150 & 151 shall be used for the purposes of any proceedings under the Act without giving an opportunity of being heard to the person concerned

INTEGRATED GOODS AND SERVICES TAX ACT, 2017

[Clause 114] **(w.e.f. date to be notified)**

- Section 16 of the Act is being amended so as to:

  I. Restrict zero-rated supplies made to SEZ unit / developer only when made in respect of authorized operations

  II. Restrict zero-rated supplies on payment of IGST only to notified class of taxpayers or notified goods or services

  III. Restrict refund in case of export (of goods with refund) to cases where foreign currency remittance is within the period specified under FEMA Act

CUSTOMS

Legislative changes in the Customs Act, 1962

Introduction of "common portal"

[Clauses 80, 90, 91]

- Section 2(7B) has been introduced in the Customs Act, 1962. This section defines a "common portal". The abovementioned section states that common portal is the common customs electronic portal referred to in section 154C.
- Clause (ca) in sub section (1) of section 153 has been introduced so as to enable service of order, summons, notice, etc. by making it available on the common portal.
- Chapter XVII is being amended so as to insert a new section 154C for notification of a common portal for facilitating registration, filing of bills of entry, shipping bills, any other document or form prescribed under this act or under any other law for the time being in force or the rules and regulations made there under, payment of duty and for carrying out such other functions and for such purposes as may be specified.

Expansion of powers of Commissioner (Appeals)

[Clause 81]

- Section 5(3) lays down the power of commissioner (Appeals).
- Earlier, this power was only limited to summon persons to give evidence and produce documents (contained in section 108) and the power in the case of appeals and revision (contained in Chapter XV).
- The abovementioned section is now amended in order to empower the Commissioner (Appeals) to carry out seizure of goods and documents in case the good seized is gold (as contained in the newly inserted section 110(1D) of the Customs Act, 1962).

Discontinuation of conditional exemptions

[Clause 82]

- Section 25 of the Customs Act has been amended to discontinue all the conditional exemptions given under section 25(1) of the Customs Act, 1962.

- These exemptions shall be discontinued on the 31st of March immediately following two years post the date of such grant or variations, unless otherwise specified or varied or rescinded.
- Furthermore, all existing conditional exemptions in force as on the date on which the Finance Bill 2021 receives the assent of the President unless having a prescribed end date, shall come to an end on 31st March, 2023 (if not specifically extended/ rescinded earlier) on review.

Extended time limits for completion of proceedings for audit, investigation etc.,

[Clause 83]

- Section 28BB has been introduced in the Customs Act, 1962.
- The abovementioned section prescribes a two year time limit for completion of any proceedings warranting the issue of a show cause notice ("SCN") under Section 28 of Customs Act, 1962 (offences relating to recovery of duties not levied, short levied or erroneously levied) where SCN is due to audit investigation etc.
- This time limit is further extendable by a period of one year.

Compliances before arrival of goods

[Clause 84]

- Sub section (3) of section 46 has been amended to mandate the filing of bill of entry before the end of the day preceding the day of arrival of goods.
- Such period is inclusive of any holidays.
- Furthermore, a new proviso has been introduced therein, to enable the Board to notify the time period for presenting bill of entry in certain cases as it may deem fit.

Revision of procedure for disposal of seized gold

[Clause 85]

- The procedure for pretrialdisposal of seized gold, in any form as notified, has been proposed to be revised by way of amendment of section 110 of the Customs Act, 1962, vide insertion of subclause 1(D) to section 110.
- Where gold in any form has been seized by a proper officer under sub section (1) of section 110, he shall make the application referred to in sub section (1B) of section 110 to the Commissioner (Appeals) having jurisdiction, who shall, as soon as may be, certify the correctness of the inventory and allow the application.

- The proper officer shall thereafter dispose of the goods in such manner as the Central Government may determine.

Confiscation of goods in case of a wrongful claim of refund

[Clause 86]

- Clause (ja) has been introduced in Section 113 of the Customs Act, 1962 to provide for the confiscation of any goods entered for exportation under the claim of remission or refund of any duty or tax or levy, wherein a wrongful claim is made in contravention of the provisions of the Customs Act, 1962 or any other law for the time being in force.

Penalty for fake invoicing

[Clause 87]

- Section 114AC has been introduced in Customs Act, 1962 to prescribe penalty in specific case where any person has obtained any invoice by fraud, collusion, wilful misstatement or suppression of facts to utilize GST Input Tax Credit and such ITC or any duty is claimed as refund on exportation of goods.

Evidentiary value of documents produced before Commissioner (Appeals)

[Clause 88]

- Section 139 states that if a document is produced by the assessee, as evidence, in the course of investigation, the court shall presume that the document was signed or attested by him.
- Explanation to Section 139 states that these documents also include the inventories, photographs and lists certified by a Magistrate.
- This explanation has now been amended to include the documents certified by the Commissioner (Appeals) under the new subsection (1D) of section 110.
- Therefore, the court shall presume the veracity of the documents certified by the Commissioner (Appeals).

Provisions of making amendments through the common portal

[Clause 89]

- Section 149 is being amended so as to
  i. Allow amendments in the shipping bill, bill of entry or bill of export, to be made through the customs automated system on the basis of risk evaluation through appropriate selection criteria.

ii. Introduce a third proviso so that certain amendments, as may be specified by the Board, may be done by the importer or exporter on the common portal.

Legislative changes in the Customs Tariff Act, 1975

Amendments to provisions relating to Anti-Dumping Duty, Counter-veiling Duty and Safeguard Measures

[Clauses 93 & 94]

✦ Sections 9 and 9A of the Customs Tariff Act, 1975 are being amended to make the following amendments in the provisions relating to Anti Dumping Duty ("ADD"), Counter Veiling Duty ("CVD") and Safeguard measures:

i. Retrospective levy of CVD/ADD to counter circumvention.

ii. Duty shall be imposed from the date of initiation of anti circumvention investigation.

iii. Anti Absorption provisions have been introduced to counter situations whereby the exporting country tries to mitigate the impact of ADD/CVD by reducing the export prices.

iv. There will be a sunset provision of 5 years on the imposition of ADD/CVD. The review proceedings shall be concluded by the designated authorities at least three months prior to the expiry of imposition of duties (i.e., with effect from 1st Jul, 2021).

v. There will be a uniform set of provisions for imposition of ADD/CVD on account of inputs used by EOUs and SEZs for manufacturing goods that are cleared to Domestic Tariff Area;

vi. Any ADD or CVD can be temporarily revoked for a period not exceeding one year.

vii. There will be a provisional assessment in the anticircumvention investigation.

viii. The application of safeguard measure, including tariff rate quota shall be according to the manner specified in the Safeguard Duty Rules (now the safeguard measures Rules)

Miscellaneous Changes

[Clause 115 & 116]

✦ **Imposition of Agriculture Infrastructure and Development Cess**

This cess has been imposed for the purposes of the Union for financing the agriculture infrastructure and other development expenditure. It will be imposed as basic customs duty on goods imported into India at the rate not exceeding the rate of customs duty on such goods, and will be imposed as additional duty of excise on excisable goods (petrol and diesel).

✦ The rates of the abovementioned duties have been lowered, where the cess is applicable.

Legislative changes in the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017

- The following changes have been proposed in the rules:

  i. Imported capital goods that have been used for the specified purpose can be cleared on payment of differential duty, along with interest, on the depreciated value, according to the depreciation norms applicable on Export Oriented Units (EOUs) as per foreign trade policy.

  ii. Any treatment or process including packing, labeling, testing, re conditioning, repacking, inspection etc. under taken by a person on goods belonging to another registered person (job-work) of the materials can be fully outsourced. Moreover, these goods can be imported under concessional rate of duty (except for gold and jewellery and other precious metals).

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