BUDGET ASSAYER

India Budget 2020-21

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Foreword

The Budget for 2020-21 came with three-pronged vision of Aspirational India, Economic Development and Caring India. As per the Hon'ble Finance Minister, the bouquet of Aspirational India, Economic Development and Caring India has to be held with two hands – one hand being Governance and the other being the Financial Sector.

The Financial Sector underwent a slump in the existing FY. Thus, the much look forward to Budget had to cater to the mounting expectations from the business, industry and other constituents who were desperately looking for an opportunity to get back to their earlier growth path as well as create mechanisms to meet the fiscal requirement of the Government. Amidst this, the Finance Minister delivered one of the longest ever budget speech, trying to pacify multiple constituents with a hope to achieve widely expected growth impetus and unrealistic expectations.

Despite the many measures announced, spread across an array of activities, the immediate reaction of the markets has been a bit negative since they looked for some big announcements of fiscal stimulus which could have given the confidence to the economists and industry champions to see the effect of revival in the long wanting and slowing economy. Thus, while there have been a few positive spots, at a macro level, the budget seems to have missed to instigate widespread cheer.

Among the positives, other than the fact, there has been no increase in tax rates, corporates have been offloaded from the burden of paying tax on dividends, by shifting the burden to shareholders again. There have been increased benefits for start-ups and employees of start-ups and extension of lower taxation of interest on foreign bonds and similar instruments. Even sovereign wealth funds of foreign countries have received attention in terms of exemption this Budget. Affordable housing schemes and real estate sectors have also been on the gaining end. In terms of compliance, there has been increase in the threshold requirement to undertake audit, which may be welcomed by taxpayers. Taxpayers' rights and the hardships faced by them have also been addressed through introduction of Taxpayers Charter and faceless appeal mechanisms. The enactment of Significant Economic Presence has been deferred and effort has also been made to align the tax laws with recently implemented with MLI. Further, stringent measures have also been proposed to prevent abuse of preferential trade agreements as well as dumping.

While these seem to be the welcomed measures, the lows of this Budget include unnecessary tampering of income tax slabs and making it more complex while claiming to simplify them; enhancing the scope of business connection; increasing the ambit of taxation for non-resident Indians and deemed residency for Indian citizens not paying taxes anywhere in the world; tax deduction at source obligations on e-commerce transactions; enlarging the scope of TDS on interest and tightening of the present tax collection at source regime such as levy of TCS on payments made under the liberalized remittance scheme beyond INR 0.7 million; and lack of a roadmap for overhaul of the GST regime.

In continuation of our earlier tradition, we have made our sincere efforts to examine the impact of the Budget 2020 on the taxpayers. We hope you will find our work informative and helpful in your decision making efforts.

We would appreciate your feedback on our work and look forward to receiving your comments at cam.publications@cyrilshroff.com.

Yours sincerely,

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SECTION A:

ANALYSIS OF PROPOSED CHANGES IN DIRECT TAX

I. TAX RATES

In view of the fact that an option to avail substantially lower tax rates for domestic companies was announced in September, 2019 through Taxation Laws (Amendment) Act, 2019, it was anticipated that the Budget 2020 may not have major overhauling tax rates again for corporates. However, the Bill now proposes to provide a similar option to avail lower tax rates to individuals, HUF and co-operative societies as well. The Bill proposes:

i. to vest individuals and HUFs with the option to avail reduced slab rates of income tax provided such taxpayer does not avail certain specified exemptions or deductions and fulfills certain other conditions. These slab rates are as follows :

Total Income	Rate*
INR 250,000	Nil
From INR 250,001 to INR 500,000	5%
From INR 500,001 to INR 750,000	10%
From INR 750,001 to INR 1,000,000	15%
From INR 1,000,001 to INR 1,250,000	20%
From INR 1,250,000 to INR 1,500,000	25%
Above INR 1,500,000	30%

*applicable surcharge and cess will be added to these rates.

The taxpayer claiming this new regime will not be eligible to claim a host of deductions available under the current regime; such as housing rental allowance, leave travel allowance, interest on house property, certain deductions in relation to salary etc. If the taxpayer fails to satisfy the conditions specified in this provision in the year in which he/she opts for this regime, the taxpayer will not be eligible to claim this benefit in that year and in all subsequent years.

Further, this regime provides the flexibility to an individual/HUF taxpayer to choose between the current regime and the proposed regime of taxation on a yearly basis, provided the taxpayer does not have any 'business income'. A taxpayer who has business income and has opted for this regime can only go back to the current regime once. Thereafter, he cannot re-opt for this proposed regime.

ii. to offer co-operative societies the option to pay tax at a concessional rate of 22%, as compared to the tax rate of 30% imposed on co-operative societies under the current provisions, provided such taxpayers do not avail certain specified exemptions/deductions. Further, the Bill proposes to exempt the co-operative societies opting for the aforementioned lower tax rates, from the Alternate Minimum Tax ("**AMT**").

The Bill also proposes to change the due date of return filing for taxpayers, being a company or any other person subject to audit under the IT Act or any other law, to October 31 as against September 30 under the current provision.

The amendments are proposed to be effective from April 1, 2020.

There are no proposed changes in the rates of income tax, surcharge, as well as health education cess in other case

II. TAX INCENTIVES

i. Abolition of Dividend Distribution Tax

Currently, under section 115-O of the IT Act, distribution of dividends by a domestic company is subject to an additional income tax, called Dividend Distribution Tax ("**DDT**"), in the hands of the company at an effective rate of 20.56% (inclusive of the applicable surcharge and cess). Such tax is treated as the final tax on dividends and is exempt from any further incidence of tax in the hands of the investors.

The extant IT Act also contains a similar mechanism in case of mutual funds, whereby mutual funds are liable to pay additional income-tax at the specified rate on any income distributed by them to their unit holders, and the dividends received by the investors or unit holders are exempt from tax in their hands under section 10(35) of the IT Act.

Overall levy of DDT had been questioned by a lot of investors, since it was required to be paid irrespective of whatever rate the shareholder was liable to pay taxes in India. Section 115-O also specifically prevented the taxpayer and the distributing company from claiming any credit for the DDT. Similarly, since DDT is a taxed imposed on the company rather than the shareholder, a number of non-resident taxpayers were not able to claim any foreign tax credit for the DDT paid by the company in India.

As far as Indian resident investors were concerned, some of them were also not happy because they were either subject to tax at a lower rate than 20.56% or were not liable to pay any tax at all and hence, they were complaining about the company having to pay DDT at the rate of 20.56%.

Finally responding to the multiple representation made by a number market constituents, the Bill proposes to abolish DDT regime and re-introduce the classical method of taxing dividends. The changes proposed through the Bill may be summarized as under:

DDT Abolished and Dividends taxed in the hands of the shareholders: The Bill proposes to amend the IT Act to provide that DDT will not be payable in respect of dividends declared, distributed or paid by a domestic company after March 31, 2020 and accordingly, such dividends would not be exempt in the hands of the shareholders. Similar amendments have also been proposed in respect of income distributed by mutual funds, whereby distribution made by mutual fund are proposed to be taxed in the hands of the unit holders.

Withholding Tax: The Bill also, proposes to amend section 194 of the IT Act to impose a withholding tax at the rate of 10% on all dividends paid by an Indian company, by any mode whatsoever, to a resident shareholder. Similar withholding tax is also proposed to be imposed in relation to distributions made by mutual funds.

It is also proposed to introduce a withholding tax on dividends paid to a non-resident.

It may be noted that since the withholding provisions merely suggested that tax shall be withheld by the mutual funds at the rate of 10%, there was a lot of anxiety regarding the amount on which withholding shall be applicable and whether the mutual shall also be required to withhold tax at the time of renewals too. However, in order to set the demon at rest, the CBDT has clarified through a press release dated February 4, 2020 that, mutual funds shall not be required to withhold tax to the investors when the payments are in nature of capital gains.

Deduction for inter-corporate dividends: To reduce the cascading effect of taxation of dividends, the Bill proposes to introduce a deduction for dividends received by one domestic company from another domestic company, in computing the total income of the shareholder company. However, this deduction would be limited to amount of dividend distributed by the investee company before the due date i.e. one month prior to date of furnishing the return. Thus, if the investee company does not distribute dividends before the due date, no deduction shall be available to the recipient company.

It may be relevant to note that this deduction would be available, irrespective of the percentage of shareholding of the shareholder company in the investee company.

Dividends paid to Business Trust: The Bill also proposes to exempt dividends received from special purpose vehicles in the hands of business trust and tax the same in the hands of the investors in such business trusts. The Bill also proposes to amend section 194LBA of the IT Act in order to impose a 10% withholding tax on all dividends distributed by business trusts to non-resident unit holders.

Sunset on additional tax on Dividends: Section 115BBDA of the IT Act imposes an additional tax of 10% (plus applicable surcharge and cess) on dividends received, in excess of INR 1 million, by certain specified resident investors. Now, considering the dividends would be taxed in the hands of the taxpayers at the applicable rate. The Bill proposes to amend the said section to provide that no additional income tax would be payable under section 115BBDA, with respect to dividend distributed after March 31, 2020.

Deduction of expenses: Under the proposed provisions the dividend income would generally be taxable in the hands of the taxpayer under the head of ‘other incomes’. The Bill proposes to amend section 57 of the IT Act to a deduction for expenses in relation to dividend income to the extent of 20% of the dividend received, in computing the income under the head of 'other incomes'. This comes as a big relief for the taxpayers, as under the current provisions shareholder cannot claim a deduction for expenditure incurred for the purpose of earning dividend income.

This proposal is likely to be greeted with great cheer by the foreign taxpayers. The non-resident investors would not only be able to take advantage of the lower tax rates specified in the DTAAs, they would also be entitled to claim credit for the taxes paid in India, against the tax payable in the country of their residence. Considering that the majority of the DTAAs entered into by India provide a beneficial rate of 10% for taxing dividends, the cost of equity investment is likely to be substantially reduced, at least for the non-resident investors. Having said this, it may be relevant to note that the beneficial rate under the DTAA is generally restricted the 'beneficial owner' of the dividends. Therefore, the question of beneficial ownership, in relation to dividend income will become pertinent.

In case of resident individuals, despite various beneficial proposals, such as abolition of addition tax on dividends under section 115BBDA, allowing deduction for expenses, the tax cost in relation to dividends may increase as dividend income, in the hands of resident taxpayers, would be taxed at the applicable rates, which may go up to ~ 43%. This increased rate of tax on dividends is likely to affect the promoters holding shares in the companies, in their individual capacity or through trusts.

However, the proposed abolition could dampen the spirits of the Real Estate Investment Trusts ("**REITs**") and Infrastructure Investment Trusts ("**InvITs**"). As per the existing section 115-O(7) of the IT Act, the dividends distributed by the SPVs which are 100% held by REITs/InvITs were not subject to DDT. Similarly, such dividends were also exempt in the hands of the said REITs/InvITs by virtue of section 10(23FC) of the IT Act. Thereafter, upstreaming of such dividends by InvITs/REITs were also outside the purview of DDT since they were considered as pass-through entities under section 115UA(1) of the IT Act. Even at the final level i.e. in the hands of unitholders of REITs/InvITs, such dividends were exempt from tax by virtue of section 10(23FD) of the IT Act.

The Bill now proposes to omit the exemption provided to the unitholders by amending section 10(23FD) of the IT Act. This would make the investments in REITs/InvITs less attractive which would hamper the revival of the struggling the real estate industry.

These amendments are proposed to be effective from April 1, 2020

ii. Offshore funds provided respite from taxability in India

An NR is taxable in India in respect of 'business income' if it has a business connection under the provisions of the IT Act or a PE under the applicable DTAA. If the NR is a resident of country with whom India does not have a DTAA, then his liability to pay taxes in India will depend on his constituting a business connection in India.

In order to provide a further breather to offshore funds being managed by Indian fund managers and to ensure that they are not confronted with any evidences that may create any tax exposure in India, it was proposed through a change in the Finance Act, 2015 that such entities may not create any business connection so long as the adhere to the specific conditioned prescribed therein which is expected to promote offshore funds being managed from India, subject to certain eligibility criteria.

Section 9A of the IT Act which contains this beneficial regime provides that, fund management activity carried out by an eligible fund manager, in respect of an eligible fund, shall not constitute 'business connection' in India of such fund in India if meets the conditions provided under the said provision.

One such condition provided for under section 9A of the IT Act is that the monthly average of the corpus of the fund should be at least INR 1 Billion, at the end of the financial year. The Finance Act, 2019 had made certain changes to the eligibility criteria in trying to make this proposition more viable. Accordingly, this time period to test the monthly average of the corpus was amended to, later of (i) at the end of a period of six months from the last day of the month of fund's establishment or incorporation, or (ii) at the end of such previous year.

Based on the representations made by the stakeholders, it was observed that the amended time period could result in a discriminatory time period being available to funds to meet the average monthly corpus, to avoid any potential discrimination based on the date of establishment of the Fund, the Bill proposes to amend this condition, to provide a uniform period of 12 months from the end of the month in which the fund is established to meet the condition of having a monthly average corpus of INR 1 Billion.

Another condition to avail the above beneficial regime is that the participation or investment in the fund, directly or indirectly, by persons resident in India should not exceed 5% of the corpus of the fund. The industry represented that this condition is difficult to comply within the initial years as eligible fund manager is also required to invest his own money to create confidence amongst investors for attracting investments. On the basis of these representations, the Bill proposes to exclude contribution of up to INR 250 Million (made by the eligible fund manager during first three years) while calculating the aggregate participation or investment in the Fund. This proposal takes into account the commercial realties of the funds sector, where the fund manager would need to invest more during the initial few years of the funds cycle/life to be able to attract investments. The proposal is thus, a welcome move and should aid in qualifying as an 'eligible fund' under section 9A of the IT Act more easily than under the extant provisions.

This amendment is proposed to be effective retrospectively from April 1, 2019.

iii. Start-ups and their employees extended a lifeline!

a. Longer period to avail tax holiday by start up

Start-ups fulfilling some conditions enjoy a tax holiday (i.e. 100% exemption from income-tax) for 3 out of the initial 7 years from the date of incorporation, subject to certain conditions. One such condition provided under section 80IAC is that the turnover from business of the relevant start up entity should not exceed INR 250 million in the year in which the deduction is claimed.

The Bill proposes to extend this benefit to start-ups with turnover not exceeding INR 1 billion. Importantly, allowing start-ups a longer time period to claim the tax holiday the Bill also proposes to raise the period of 7 years to 10 years. Therefore, now start-ups can avail the tax holiday for a period of 3 consecutive years out of the 10 years from the year in which they are incorporated.

It is relevant to note here that the Ministry of Commerce and Industry, vide Notification No. GSR 127(E), dated February 19, 2019 ("**MoCI Notification**"), had laid down the manner in which a certificate of eligible business for start-ups may be obtained from the Inter Ministerial Board of Certification. The Notification also-provides that for an entity to be recognized as a 'start-up' under the Notification, its turnover should not exceed INR 100 crores in any of the financial years since its incorporation and it should be engaged in eligible business, as defined above. The MoCI Notification further clarified that an entity recognized as a start-up, would cease to be a start up on completion of 10 years from the date of its incorporation or if its turnover exceeds INR 100 crore in any year.

The above MoCI Notification resulted in different criteria for the entity to be recognised as a start up by the Inter Ministerial Board of Certification and a different criteria for being eligible to the tax holiday. These amendments proposed by the Bill would align various provisions relating to start ups. Overall, given the recent clarifications regarding easing the processes for registration as a start up, exemption for start-ups from application of section 56(2)(viib) of the IT Act (subject to conditions), etc. should make the tax regime less daunting for these entities. More so, this should provide the much needed boost to the budding entrepreneurs who are starting up in hopes of being the next unicorn.

This amendment is proposed to be effective from April 1, 2020.

b. Stock options – Taxes deferred

Employee stock options ("**ESOP**") are regarded as perquisites received by employees. Consequently, such ESOPs are taxed as 'salary' income received from the employer. Taxation of ESOPs is split into two events:

a. Time of exercise of options by the employees.

b. When shares (received post exercise of options) are sold by employees.

The tax on perquisite is levied at the applicable slab rates for individuals on the difference between the fair market value of shares (as determined by a Category I Merchant Banker) and exercise price paid by the employee (if any). The Bill proposes to amend the taxing provisions and the tax on ESOP will be triggered at the earlier of the following:

a. 5 years from the end of the financial year in which options are exercised;

b. date of the sale of shares received pursuant to conversion of ESOPs by the employee; or

c. the date on which the employee ceases to be the employee of the company.

Tax on these ESOPs will be payable on the basis of applicable slab rates in force during the financial year in which the option was exercised and shares were allotted or transferred to the employee.

The current provisions, require a cash outflow at the time of exercise of options which results in payment of taxes (by way of withholding by the employer or taxes paid by employee himself) even though no monetary benefit is received by the employee. Generally, these shares may also not be marketable enough for the employees to sell them immediately to generate cash for payment of taxes. These amendments should provide considerable relief to employees of start ups and allow them time to accumulate the necessary cash for payment of taxes or make arrangements for sale of shares to generate cash.

While the above benefits are currently only available to employees of start-ups which are eligible to claim tax holiday, the issue of timing of payment of tax has not been resolved in case of employees receiving ESOP for other unlisted companies. The Government should consider extending this benefit to all employees as ESOPs as a tool is widely used to promote loyalty, entrepreneurship and to improve performance of the employees.

This amendment is proposed to be effective from April 1, 2020.

iv. Exemptions to sovereign wealth funds upon investments in Indian Infrastructure

The Bill proposes to encourage investments from sovereign wealth funds in Indian infrastructure facilities by exempting their income earned from India in the nature of dividend, interest or capital gains so long as the said investment is made on or before March 1, 2024 in an Indian company, which is in the business of developing or operating and maintaining any infrastructure facility as defined in section 80-IA(4) of the IT Act, and the investment is locked in for 3 years.

India has become an attraction point for sovereign wealth funds globally in the recent past. Several sovereign funds have also started investing good amounts outside their home jurisdiction and are willing to look at investment opportunities so long as they expect decent returns on their investments. In the current financial year, India saw a pool of large infrastructure investments from sovereign wealth funds of countries such as Singapore (namely GIC and Temasek Holdings) and UAE (e.g. ADIA) etc. Among recent deals, in June 2019 GIC and ADIA had invested in India based renewable energy firm, Greenko Energy Holdings. Similarly, in April, 2019 ADIA along with India's only sovereign wealth fund National Investment & Infrastructure Fund ("**NIIF**") agreed to buy a 49% stake in airport unit of Indian conglomerate GVK Power & Infrastructure.

In the recent past, India has also seen investments from pension funds of foreign countries in *inter alia* infrastructure as well. For instance, Canada Pension Fund Investment Board had agreed to invest in NIIF in December, 2019, through NIIF master fund. However, the proposed definition of 'specified persons', to whom the exemption will be available, does not provide any clear indication as to whether these pension funds would also be eligible for exemptions. Clarifications on the same would be very helpful.

Given the increased focus of global funds to invest in India, the proposed amendment will encourage further investments by sovereign funds in the infrastructure facilities in India.

It is pertinent to note that the proposed amendment provides that for availing the exemption, the funds should not be carrying any commercial activities. As the term 'commercial activities' has not been defined in the proposed amendment, it may lead to unnecessary confusion and litigations because the tax authorities may challenge many funds on this ground. In order to avoid any unnecessary litigation and undue harassment, especially since this provision deals with sovereign funds, which could also complicate our political relationships with certain countries, it may be advisable for the CBDT to come up with a definition of commercial activities so that the taxpayers would know well in advance what to do and what not to do. This will also help in implementing the law without unavoidable duplicities.

Alternatively, the Government may want to name the sovereign funds of the specific countries who are interested in investing in Indian infrastructure facility and name them by way of a notification so that it is absolutely clear the proposed beneficiaries of this largesse. It could also avoid any unnecessary confusion or lack of trust between Indian authorities and such funds.

The amendment will take effect from April 1, 2020.

v. Empowering the power sector

The Taxation Laws (Amendment) Act, 2019 recently amended the IT Act to vest the newly set-up manufacturing companies with an option to pay corporate tax at a lower rate 15%, subject to certain conditions and provided income of such companies is computed:

a. without claiming any relief or tax holiday available to units in special economic zone or companies engaged in power transmission; or operating in notified backward areas in certain states; or business of growing and manufacturing coffee, tea or rubber; scientific research or biotechnology; or skill development project or deductions in respect of certain specified incomes;

b. without setting off any loss carried forward from earlier years which pertains to the above deductions claimed in previous years; and

c. claiming depreciation only in the manner to be prescribed.

This is a positive initiative and the FM wanted to provide impetus to the power sector and accordingly, the Bill proposes to extend the lower corporate tax rate of 15% to newly set-up companies engaged in the business of generation of electricity. This proposal comes as a part of the beneficial corporate tax regime and would also be extended to entities engaged in the business of generation of electricity, which otherwise may not have qualified as a manufacturing entity.

The amendments are proposed to be effective from April 1, 2019.

vi. Extension of concessional tax rate benefits

Section 194LC of the IT Act provides for a concessional rate of withholding tax at 5% for interest payments on the foreign currency loans, including masala bonds, by an Indian company or a business trust to non-residents provided that the rate of interest does not exceed the amount of interest prescribed to be payable on such instruments by the Government. However, this section was introduced with a pre-decided auto expiring time lines in order to ensure that Indian industry is able to borrow long term without facing any significant challenges and uncertainties. However, the economic environment remained challenging and the Government had to extend the expiry period of these loans again and again.

Thus, it was no surprise, especially when Indian economy is facing some serious funding constraints and questions are being raised on the growth rate of Indian industry, the FM did not have any option but to ensure that the investors remain bullish about India and continue to invest. Thus, with an objective to ensure that the foreign investment interest in India is intact and also to stimulate the economy, the Bill proposes to extend the period of such borrowings by a period of three years i.e. from July 1, 2020 to June 30, 2023.

Accordingly, the provisions of sections 194LC and 194LD of the IT Act, which provided for a withholding of tax at concessional rate of 5% on interest payments made by Indian companies borrowing money from foreign investors by way of external commercial borrowings or borrowed from Foreign Institutional Investors ("**FIIs**") and Qualified Foreign Investors ("**QFIs**") on their investments in masala bonds or in Government securities, is now proposed to be extended to July 1, 2023 from the existing July 1, 2020.

To further broaden access of FIIs and QFIs to the debt instruments issued by Indian municipalities, the Bill proposes to extend this concessional withholding tax on interest payments made by municipalities on debt securities issued by them. Municipal debt securities refers to non-convertible debt securities which create or acknowledge indebtedness, and include debenture, bonds and such other securities issued by the municipalities, generally for huge infrastructure development projects. Notably, RBI *vide* A.P. (DIR Series) Circular No. 33 dated April 25, 2019 permitted Foreign Portfolio Investors ("**FPIs**") to invest in municipal bonds subject to the limits set for FPI investment in State Development Loans, following which SEBI issued a Circular on May 8, 2019 to this effect. Therefore, this amendment is in alignment with the Government's aim of promoting foreign investment in building infrastructure in the country.

Additionally, the Bill proposes to levy a further concessional rate of withholding tax rate of 4% on the interest payable to foreign companies on foreign currency loans obtained through long-term bonds or masala bonds issued on or after April 1, 2020 but before July 1, 2023, which is listed in the International Financial Services Centre. This is the lowest ever withholding rate proposed by India in respect of interest payments (excluding interest payable to certain Government and Government agencies which had exempted such income). With the GIFT City being operational, it is highly anticipated that this concessional provision may encourage many Indian entities to list their securities in the stock exchange there and hence, this can become an important source of organizing resources for the Indian industry.

These amendments are proposed to be effective from April 1, 2020.

vii. Additional deductions under the lower corporate tax regime

Currently, domestic companies and newly set-up manufacturing companies are vested with an option to pay corporate tax at a lower rate of 22% and 15% respectively, provided such companies do not avail certain specified tax benefits. Some of the deduction which have been prohibited under these regime include deductions under chapter VI-A of the IT Act, except for section 80JJAA, which provides for additional deduction in respect of new employees.

The Bill proposes to allow companies opting for the lower tax regime an additional deduction under the newly re-introduced section 80-M of the IT Act. Thus, corporate taxpayers opting for lower tax regime will also be allowed to claim deduction for dividends received from another domestic company, in computing the total income of the taxpayer company. This, proposal is likely to be welcomed with a great cheer, as it makes the lower corporate tax regime even more lucrative for certain taxpayers.

The amendments are proposed to be effective from April 1, 2019.

viii. Incentives to affordable housing

Section 80-IBA was inserted in the IT Act *vide* Finance Act, 2016 to provide 100% deduction to taxpayers with respect to profits and gains derived the business of developing and building housing projects. The deduction was available only to the budget housing sector and in lieu of the same, certain conditions were specified, including a condition that such housing projects should be approved by the competent authority between June 1, 2016 and March 31, 2019 (extended to March 31, 2020 *vide* Finance Act, 2019). In order to provide a further boost to affordable housing and promote Government's objective of '*Housing for All*' by 2022, the Bill proposes to extend the period of approval of such housing projects by competent authority till March 31, 2021.

Similarly to augment the purchasing power of the consumers, the Bill proposes to extend the benefit of deduction given under Section 80EEA of the IT Act for interest on loans taken for acquisition of residential house property to March 31, 2021. Section 80EEA of the IT Act provides deduction of up to INR 0.15 million with respect to interest on loans taken for acquisition of a residential house property from any financial institution subject to the conditions that: (i) loan is sanctioned on or after April 1, 2019 and before the prescribed March 31, 2021; (ii) stamp duty value of the house property does not exceed INR 4.5 million; and (iii) the taxpayer does not own any residential property on the date of sanctioning of loan.

The Government by providing incentives to both, the developers and home buyers, in the budget housing sector seeks to revive the ailing real estate sector. However, in absence of any major announcement to bailout the realty sector from the liquidity crunch, these incentives under the Bill might not prove to be enough to recuperate the real estate sector.

These amendments are proposed to be effective from April 01, 2019 onwards.

III. REMOVING DIFFICULTIES FOR TAXPAYERS

i. Tax exemption to unlisted business trust

Section 10(23FC) of the IT Act exempts income of business trust being, (i) interest income received by a the business trust from a SPV, where the business trust holding holds controlling interest and such percentage holding prescribed under the SEBI Infrastructure InvITs Regulations or REITs Regulations; and (ii) dividend income. Thus, owing to a 'pass through' status under the IT Act in respect of interest and rental income (in case of REITs), were subject to tax directly in the hands of the investors. These trusts are collectively defined as 'business trusts' under the IT Act. Section 2(13A) of the IT Act defines "business trust" to mean a trust registered as an InvIT under the InvIT Regulations or a REIT under the REIT Regulations, whose units are required to be listed on a recognised stock exchange in accordance with the InvIT Regulations or REIT Regulations, as the case may be.

For claiming this tax pass through status accorded under section 10(23FC) of the IT Act, units of these trusts must be listed on stock exchange in accordance with the relevant regulations of the SEBI.

SEBI (Infrastructure Investment Trusts) (Amendment) (Regulations), 2019 have done away with the mandatory listing requirement for InvITs. Thus, with an objective of align the IT Act with the SEBI Regulations, the Bill proposes to allow the benefit of 'tax pass through' status also to those business trusts whose units are not listed. This proposal is aimed at making business trust route more attractive and to augment foreign investment in India, while the tax pass through status is proposed to be extended to unlisted InvITs absence of regulation and control of SEBI in contrast to listed InvITs, should be assessed and weighed properly.

This amendment is proposed to be effective from April 1, 2020.

ii. No 'Thin – Capitalization Rules' for the debts issued by PE of a non-resident Bank

Finance Act 2017 introduced thin-capitalization rules into the IT Act as per the recommendations made by BEPS Action Plan 4. It restricted the allowable interest expenditure in the hands of the borrower, being an Indian company or the PE of a foreign company in India, to 30% of its EBITDA (i.e. Earnings before interest, tax, depreciation and amortization), if the lender is a non-resident and is a related party of the borrower i.e. an associated enterprises under the IT Act.

Under the provisions of the IT Act, a branch of the foreign company in India is a non-resident in India. Therefore, as per the existing provisions, the loans issued by a branch of foreign bank in India were also subject to thin capitalization rules if the bank is construed to be a related party of the borrower in India. It created a number of situations wherein genuine and market linked borrowings were subjected to disallowances because was no exceptions were provided to this rule.

The Bill proposes to carve out the loans granted by the branches of foreign banks operating in India from the purview of thin-capitalization rules which would enable Indian branches of foreign banks to issue loans even to their related party entities in India. It may be noted that the erstwhile provision was acting as a double whammy for the parties because interest income in the hands of the Indian branches were anyways taxable in India on a net basis at the rates applicable to non-residents and on the top of it, the interest expenses were not allowed as a deduction in the hands of the borrower. Moreover, interest amount payable by an Indian branch to its head office was also subject to a number of limitations. Hopefully, the proposed change would rationalize the provisions and undue hardships faced by the entities would now get resolved.

The amendment is proposed to be applicable from April 1, 2020.

iii. Exemption to NRs from filing income-tax returns in certain circumstances

Section 115A of the IT Act (Section 115A), provides income-tax rates for certain specified incomes in the nature of dividends, interest, royalty and FTS earned by non-residents (not being company) or a foreign company. The extant section further provided that non-residents earning only dividends or certain specified interest income need not file Income-tax returns, if tax at the applicable rates was already deducted by the payer while making such payments. No such deductions or exemptions are available to non-residents earning royalty or FTS income since such payments are also subject to withholding tax at the prescribed rates under section 115 read with section 195 of the IT Act. In order to correct this anomaly, the Bill proposes to extend the benefit of non-filing of income tax returns to those non-residents which receive royalty or FTS income from India and where appropriate taxes have been deducted at the time of making these payments and deposited by the payer of such income.

This amendment shall be helpful to non-residents who are earning only royalty or FTS income in India and who do not want to file a separate tax return in India. This is a welcome change as it reduces the administrative hassle both for the taxpayer in preparing and filing a tax return as well as for the tax administrators since they will receive less number of such returns as filing of such returns was merely a routine compliance job.

The provision will become operational from April 1, 2019.

iv. Making deduction for capital expenditure optional

Currently, domestic companies and newly set-up manufacturing companies have an option to pay corporate tax at a lower rate of 22% and 15% respectively, provided such companies do not avail certain specified tax benefits including deduction under section 35AD of the IT Act.

Section 35AD of the IT Act provides for a 100% deduction for capital expenditures incurred by a taxpayer in respect of certain specified capital intensive businesses. Further, section 35AD (4) specifically stipulates that the taxpayer are not allowed to claim deduction for such capital expenditures under any other section of the IT Act. Thus, currently it is mandatory for a taxpayer to claim deduction under section 35AD of the IT Act and not under any other section of the IT Act.

As a corollary of the above, a corporate taxpayer opting for the lower corporate tax regime, who are specifically not allowed to claim the exemption under section 35AD of the IT Act, are not even able to claim usual depreciation on the capital expenditure incurred by them, which would have been otherwise available.

In order to resolve this anomaly, the Bill proposes to make it optional for taxpayer to claim deduction under section 35AD and only the taxpayer opting to claim deduction under this section would be prevented from claiming deduction for capital expenditure under any other section. Thus, the Bill proposes to allow the taxpayers, choosing to pay corporate tax at a lower rate, to claim normal depreciation on the capital expenditure incurred by them.

It may also be relevant to note that the Supreme Court in the case of *CIT v. Mahendra Mills*[1] has held in context of depreciation that a deduction cannot be imposed on a taxpayer unless specifically mentioned in the Act. Thus, relying on the above principle, even for taxpayers willing to opt for the lower tax regime in the current FY 2019-20, it would have still been possible to argue that notwithstanding the changes proposed through the Bill, the deduction under section 35AD was optional. However, with the proposed amendments, the lower corporate tax regime will become more lucrative for taxpayers, especially those engaged in capital intensive businesses, as they would be able to claim depreciation for the capital expenditure incurred while paying the lower corporate tax.

The amendments are proposed to be effective from April 1, 2019.

v. Allowing carry forward of losses or depreciation in amalgamation of certain banking and insurance companies

Currently, the IT Act allows accumulated losses and unabsorbed depreciation allowances to be carried forward in case of amalgamation of banking company with any other banking institution through a scheme under the Banking Regulation Act, 1949.

The Bill proposes to extend this benefit of carry forward of accumulated losses and unabsorbed depreciation to certain public sector banks (i.e. banks

[1] (2000) 243 ITR 56 (SC).

owned by the government), which are not governed by the Banking Regulation Act, 1949 and government companies engaged in the business of general insurance. This benefit is also proposed to be extended to amalgamation of Government companies through a scheme under the General Insurance Business (Nationalization) Act, 1972.

It is worthwhile to highlight that many Government owned banks are currently undergoing corporate restructurings on account of recent economic downturn. Section 72A of the IT Act prescribes that only the banks that are governed by section 5 of the Banking Regulation Act, 1949 would be eligible carry forward the business losses. However, many of the Government owned banks that are currently undergoing restructuring exercises do not qualify under section 5 of the said Act.

As the present Government is very keen to consolidate their holding in banking and insurance sectors and are looking for easier exits, these provisions seem to have been designed to facilitate that. It is also possible for the Government to come up with certain large scale reforms in the banking and insurance sector and this amendment may have structured in a way to facilitate such an exercise.

The amendments are proposed to be effective from April 1, 2019.

IV. MEASURES TO PROVIDE TAX CERTAINTY

i. Safe harbor rules and Advance Pricing Agreement ("APA") made applicable for profits attribution to PE

Currently, section 92CB of the IT Act provides for determination of Arm's Length Price ("**ALP**") through safe harbour rules prescribed under Rule 10TA to Rule 10THD of the IT Rules. As per these rules, if certain eligible taxpayers determine their ALP with respect to certain specified international transactions in accordance with the circumstances provided under Rule 10TD of the IT Rules, than the tax authorities cannot dispute the ALP.

The Bill proposes to expand the scope and ambit of section 92CB to the attribution of profits or income to the business connection in India and/or on account of PE of the non-resident in India. The safe harbour rules, as they currently exist, are specific to certain transactions and as such, the CBDT shall have to separately notify new safe harbour rules to account for the attribution of profits to the PE.

Similarly, section 92CC of the IT Act provides that the CBDT may enter into an APA with any person determining the ALP or specifying the manner in which ALP would be determined. The Bill proposes to allow the taxpayers to enter into an APA to determine the income attributable to the business connection or the profits attributable to the PE of a non-resident in India. The Bill also envisages additional rules prescribing the method of making such a determination. The amendment will be effective for APAs entered after April 1, 2020. Notably, an APA is valid for 5 years and can be rolled back for 4 PYs, subject to satisfaction of certain specified conditions. As such, the amendments might be beneficial for non-residents fighting litigation in the courts for the attribution of profits to a PE.

It is expected that these measures would provide certainty to the taxpayers in relation to profit attribution to their PEs in India. Further, it should also help the Government to collect significant amount of revenues without getting into long-drawn litigations.

It can be expected that the new safe harbour rules might incorporate the recommendations of the Committee, set up by CBDT to examine the issues pertaining to profit attribution to PE in India, in its report submitted last year and made public by CBDT for suggestions / comments from the stakeholders on April 18, 2019. In a nutshell, the committee rejected Functions and activities carried out, Assets and resources deployed and Risks undertaken ("FAR approach") for attribution of profits and recommended a three-factor approach which takes into account sales revenue, manpower (employees and wages paid to such employees) and assets deployed.

It remains to be seen as to how the proposed changes are accepted by the taxpayer and to what extent the tax authorities are willing to listen to the business rationale and come to a consensus with the industry with respect to the amount of profits or income attributable to the Indian PE. Whether the tax authorities are willing to go beyond the formula proposed by them in their aforesaid guideline would also be another important aspect in this analysis.

The amendment in respect of the safe harbour rules is proposed to be effective from April 1, 2019 and the amendment with respect to section 92CC of the IT Act is proposed to apply to APAs entered on or after April 1, 2020.

ii. Reduced TDS rates to prevent unnecessary litigation

Presently, income tax at the rate of 10% is required to be deducted, *inter alia*, on the following incomes under section 194J of the IT Act: (i) fees for professional services; (ii) fees for technical services; (iii) any remuneration or fees or commission (excluding those on which tax is deductible under section 192 of the IT Act), payable to a director of a company; and (iv) royalty. Under section 194C of the IT Act, income tax at the rate of 1% (in case of payments made to individuals and HUFs) and 2% (in other cases) is to be deducted on payments made to a resident for carrying out any work under a contract. There have been multiple instances where tax has been deducted by an assessee under section 194C while tax authorities have claimed that tax was to be deducted at the higher rate of 10% under section 194J. This has led to unnecessary litigation and affected both tax compliance and ease of doing business.

In order to prevent unnecessary claims from the tax authorities and reduce litigation, the Bill proposes to amend section 194J to reduce tax rate for deduction on payments for fee for technical services (excluding professional services) to 2% from the existing 10%. For all other payments the tax rate for deduction under section 194J of the IT Act continues to be 10%.

TDS has been a useful instrument for the collection of taxes by targeting the source of income itself. It is convenient for both the government and taxpayers. It benefits the government by controlling evasion and increasing compliance. It benefits taxpayers by easing their burden of paying tax. It is imperative that there is clarity in relation to such deductions. Lack of clarity would make the imposition of TDS redundant. The present framework lead to a lot of litigation when tax authorities would claim that tax was to be deducted under section 194J instead of section 194C. The claims made by the tax authorities led to unnecessary litigation and increased the burden of compliance on companies and individuals.

This amendment is aimed to provide certainty in tax liability. Further, it would reduce litigation arising out of claims by tax authorities as enumerated above, since the tax rates would be identical under sections 194C and 194J. This change in is in line with the government's commitment to reducing tax litigation and improving tax administration.

This amendment is proposed to be effective from April 1, 2020.

iii. Non – life insurance companies to be treated on par with other taxpayers

Presently, section 44 of the IT Act states that the computation of profits and gains of any business of insurance (including a mutual insurance company or a co-operative society) will be computed in accordance with the rules contained in the First Schedule to the IT Act ("**Insurance Rules**").

Rule 5 of Insurance Rules provides that profits and gains of any business of insurance other than life insurance will be taken to be the profit before tax and appropriation as disclosed in the profit and loss account prepared in accordance with the provisions of the Insurance Act, 1938 and rules made thereunder, subject to the following conditions:

a. any expenditure debited to the profit and loss account which is not admissible under sections 30 and 43B of the IT Act will be added back;

b. any gain or loss on realization of investment will be added or deducted respectively, if the same is not already credited or debited to the profit and loss account; and

c. any provision for diminution in the value of investment debited to the profit and loss account will be added back.

Section 43B of the IT Act permits certain deductions only in the previous year in which the sum is actually paid, irrespective of when the expense was incurred by the taxpayer which could be dependent based on the method of accounting used by it. Presently, though rule 5 of the Insurance Rules provides for adding back the expenses disallowed under section 43B, it does not specifically provide for deduction of any expenses specified in section 43B of the IT Act, if the expense is paid in the subsequent previous year. For instance, the accounting entry for the contribution to a provident fund for the employees was made during as incurred in FY 2017-2018, but the payment could not be actually made. Hence, for the purpose of computing profits for FY 2017-18, the expense on account of provident fund contribution will be added back to the profits of the company and hence, tax will be levied on the same at the applicable rate. The sum was subsequently paid in FY 2018-2019, but since rule 5 of the Insurance Rules did not provide for it deduction from profits in FY 2018-2019, the insurance company may not get the benefit of the deduction.

The Bill proposes to insert a proviso to rule 5 of the Insurance Rules to explicitly provide that any sum payable by the taxpayer which was added back under section 43B of the IT Act will be allowed as deduction in computing the income under the rule in the previous year in which the sum is actually paid. Thus, once the amendment takes effect, the insurance company is the above example can claim deduction for the payment made to the provident fund of its employees from its profits in FY 2018-2019. This amendment is aimed at providing certainty and reducing any ambiguity in the tax liability of insurance companies.

V. WIDENING AND DEEPENING TAX BASE

i. TDS on e-commerce transactions

The Budget seeks to introduce withholding tax compliance to e-commerce platforms. The Bill proposes to insert a new section 194-O in the IT Act which will require an e-commerce service provider to withhold tax at the rate of 1% of the gross amount of sales/service fees made by a resident seller through a digital or electronic facility or platform provided by it.

The Explanation to section 194-O (1) clarifies that the gross amount of such sales would also include payments made by the purchaser of goods directly from the resident seller. However, such tax is not deductible where the resident seller is an individual or a HUF, the gross amount of such sales does not exceed INR 0.5 million, and such individual / HUF provides Permanent Account Number ("**PAN**") or Aadhaar number to the e-commerce operator. Further, if the resident seller could not furnish his PAN, a higher tax of 5% shall have to be withheld. It also provides that once a transaction has been subjected to tax deduction under this section, no further tax is deductible on such transactions. The Bill also proposes consequential amendments to section 197 and section 204 of the IT Act.

For the purposes of this withholding, e-commerce operator has been defined to mean any person who owns, operators or manages digital or electronic facility or platform for electronic commerce. Given the wide definition of e-commerce operators, many e-commerce marketplace players, food delivery platforms, cab aggregators, companies operating in hospitality sectors etc. might be brought under the ambit of this section and as such, they should carefully evaluate its impact on their business models.

We understand that this provision has been introduced with an objective to ensure that all transactions are appropriately reported and there is no tax evasion. The requirement to submit PAN for every transaction would mandate the e-commerce operator to report each such transaction in its withholding tax return which would enable the tax authorities to investigate against each such taxpayer. The increased withholding rate of 5% also suggest that in case the taxpayer tries to evade taxes, the Government would have recovered at least 5% of the gross transaction value, which may represent the appropriate amount of tax considering the margins shown by most retail operators.

However, at the same time, the new provision could significantly increase the compliance burden for the e-commerce operators and block the working capital of genuine sellers selling their products and services through e-commerce platform operators. The net profit-margins of retailers in the e-commerce industry are very competitive and the proposed withholding tax on the gross sales is expected to affect their cash-flow significantly. It is also worthwhile to note that a class of e-commerce operators is already required to collect 1% as TCS under the GST legislations, while making payments to suppliers listed on their platforms. Hence, it remains to be seen how this provision will play out in the long run.

The amendment is proposed to be applicable from April 1, 2020.

ii. Enlarging the scope for tax deduction on interest income to tax large co-operative societies

Presently, any person (other than an individual or HUF) making a payment in the nature of interest (other than interest on securities) is required to deduct income tax at the rates in force when such payments are to a tax resident of India. However, this obligation to deduct tax is not applicable, *inter alia*, in the following circumstances: (i) if the amount of interest payable on time deposits by a co-operative society engaged in carrying on the business of banking does not exceed INR 40,000 under section 194A(3)(i)(b); (ii) on interest payable by a co-operative society (other than a co-operative bank) to a member or to any other co-operative society under section 194A(3)(v); (iii) interest payable in respect of deposits with a primary agricultural credit society or primary credit society or a co-operative land mortgage bank or a co-operative land development bank; and (iv) interest payable in respect of deposits (other than time deposits made on or after the 1st day of July, 1995) with a co-operative society, other than a co-operative society or bank referred to in (iii) above, engaged in carrying on the business of banking.

According to the provisions of section 194A(1) of the IT Act read with section 194A(3)(i)(b) of the IT Act, a co-operative bank is required to deduct tax from interest payment on time deposits if the amount of such payment exceeds specified threshold of INR 40,000. However, the provisions of section 194A(3)(v) of the IT Act provide a general exemption from making tax deduction from payment of interest by all co-operative societies to its members. In the case of *Hubli Urban Co-operative Bank Ltd v. ITO*[2] (TDS), the tribunal held a co-operative society carrying on banking business when it pays interest income to a member both on time deposits and on deposits other than time deposits with such co-operative society need not deduct tax at source under section 194A of the IT Act.

The Bill proposes to amend section 194C of the IT Act in order to impose an obligation on large co-operative societies to deduct income tax under section 194A. The Bill proposes that co-operative societies: (i) having total sales, gross receipts, or turnover exceeding INR 500 million during the financial year immediately preceding the financial year in which interest is paid or credited; and (ii) paying interest of more than INR 50,000 to senior citizens and of more than INR 40,000 in any other case, will be liable to deduct income tax under section 194A.

This amendment is aimed at widening the scope for tax deduction on interest income by bringing within its ambit large co-operative societies. By introducing specific thresholds for claiming of exemption under the section 194A, this amendment deepens the tax base for tax deduction on interest income and reduces potential instances of tax avoidance where co-operative banks are paying interest to its members.

This amendment is proposed to be effective from April 1, 2020.

iii. TCS on overseas remittances and tour packages

With the intent of expanding the tax base, the Bill proposes to implement levy of TCS on certain other transaction such as foreign remittance under through Liberalised Remittance Scheme ("**LRS**"), sale of overseas tour packages as well as sale of goods subject to certain threshold.

An authorised dealer, generally a banker, receiving an amount of aggregating to INR 700,000 or above in an FY for remittance out of India under the LRS of the RBI, is required to collect TCS at the rate of 5%.

Similarly, a seller of an overseas tour program packages receiving any amount from any buyer shall be required to collect TCS at 5% from the purchaser of such packages. However, in the absence of PAN/ Aadhaar, TCS would be collected at a higher rate of 10%.

Ideally, this amendment should not result in increase in the costs of overseas tour packages/other covered transactions, as the payer should be able to claim credit collected TCS while his/her return of income. However, this would certainly result in additional

[2] 2015 DT 164 (Bangalore Tribunal).

compliances burden in the hands of the parties.

While these provisions will entitle the Government more data about the spending pattern of several taxpayers and hopefully, may generate more revenue generating opportunities on account of evaded taxes because according to the Government, they have observed that in many instances, the saving pattern of the taxpayers do not match with their tax returns and a number of people were seen to be remitting a huge amount of funds, well beyond their returned income for the relevant period. This explanation by the Government seems very fallacious because in case the Government has data about people without having any known source of revenue remitting or spending significant sums of money, there are enough existing provisions under which they could challenge such people and recover evaded taxes. By increasing the compliance burden and trying to recover more money through the tax collection mechanism, it appears to be a more disparate mechanism to collect some additional taxes, even though they have to be refunded along with interest.

The amendment is proposed to be applicable from April 1, 2020.

iv. TCS on sales above INR 5 Million

In a zeal to plug the tax leakages, the Bill also mandates the sellers to collect taxes at source at the rate of 0.1% from the buyers, if the value of sales exceeds INR 5 Million. Moreover, if the buyers are unable to produce their PAN/Aadhaar, such TCS shall have to be done at 1%.

It is an extremely hard provision as it could lead to unintended consequences. For instance, in case where the seller is an exporter, the buyer invariably would be a non- resident. Such non-residents are usually not required to pay any taxes in India unless it falls under the specific provisions of the IT Act which make them taxable in India. Therefore, the absurdity of this new TCS provision could make Indian exports 1 per cent more expensive or the exporters may decide to bear the cost thereby reducing their already truncated profit margins since no buyer who is not liable to tax in India would be willing to bear such costs or file tax returns to obtain refund of these taxes from the tax authorities. This provision seems to contradict the industry friendly message that the Government tries to project.

The Bill allows the Central Government to notify certain transactions to be excluded from the purview of instant TCS provisions. It is highly expected that export sales shall be excluded.

The amendment is proposed to be applicable from 1 April, 2020.

v. Upper- limit of INR 0.75 million prescribed for employer's contribution

As per the existing provisions of IT Act, the employees are eligible to claim deductions on account of the following contributions made by the employers viz. (a) upto 12% of employee's salary in a recognized provident fund; (b) upto INR 150,000 in an approved superannuation fund, and (c) upto 14% or 10% of salary towards National Pension Scheme for central government employees or other employees respectively.

The Bill proposes to provide a combined upper limit of INR 0.75 Million in respect of deductions for such employer contributions in the hands of employee. This is being done to bring parity between the deductions claimed by high salary earning employees vis-à-vis their low salary earning counterparts, since a major quantum of salary of these highly paid individuals comprises of provident fund contribution made by employers and it becomes tax free in the hands of employees. Considering that persons with high salaries are getting substantial deductions from their salaries on account of these provisions and made to pay less taxes when ideally they should be bearing more taxes, this amendment has been brought in the relevant provisions. It was stated by the Revenue Secretary Mr. Ajay Bhushan Pandey that this proposal will mostly have an impact on individuals earning salary income to the tune of INR 60 lakhs (approximately).

Further, the provisions of section 36 of the IT Act have not been amended which implies that an employers will get continue to get deductions for the entire amount deposited by them on behalf of the employees into the aforementioned funds.

With this proposal, the government has continued with its trend of putting more tax burden on the high salary individuals, who are already paying taxes on a major chunk of their salary in the highest tax bracket of 30%, much higher than tax rates of 15%/22%

available for companies. Hence, the salaried class continues to bear the brunt of taxes with high surcharge rate and now more restrictions on their deductions from total salary while the corporates are getting more tax cuts and other incentives with each year.

Previously, India attempted to tax companies at higher rates, as compared to individuals. However, it has now started following the global trend of cutting corporate taxes in order to attract investment and encourage industries in the country. Consequently, in order to maintain their tax base, the Government has imposed higher tax rates on the high-earning individuals. The Government's rationale seems to be its desire to tax the ultimate beneficiaries of the profits of any corporation, i.e. the high earning individuals. The government is increasing the tax burden on high salaried individuals significantly and is doing so with each passing year while it continues to please startups and corporate entities so that it appears to be contributing towards the growth of industries and business, however the true impact of these changes on the country's financial health is yet to be seen.

This amendment is proposed to be effective from April 1, 2020.

VI. RATIONALISATION OF PROVISIONS OF IT ACT

i. Aligning and restating the purpose of entering into DTAA

The MLI seeks to modify existing provisions of bilateral tax treaties. The MLI *inter alia* contains provisions to enable modification of the preamble to notified DTAAs. The preamble under the MLI provides the purpose of entering into DTAAs as intending to eliminate double taxation and aggressive tax planning resulting in non-taxation or reduced taxation through tax evasion or avoidance, including though treaty shopping. This modification lays overarching emphasis on substance / commercial justifications in structuring transactions going forward.

The Bill proposes to amend the IT Act to authorize the government to include the modified preamble in the DTAA as provided under the MLI.

This amendment is proposed to be effective from April 1, 2020. This proposal would connote that the new DTAAs entered into post April 1, 2020 would contain this provision in the preamble. As a result, going forward even the non-covered DTAAs will incorporate this minimum standard prescribed in the MLI. As a necessary implication, it follows that the substance of the transactions/arrangements would become relevant. As discussed above, reliefs under the DTAA would now be subject to satisfaction of substance requirements under the respective tax treaties (if any) as well as the rigors of GAAR and PPT rules under the domestic law and MLI, respectively. Hence, it would be vital to assess the application of these provisions and ascertain the implications before undertaking any structuring.

ii. Significant Economic Presence: Deferred to FY 2021 - 22

Currently, the provisions of the IT Act provide that if an NR has significant economic presence ("**SEP**") in India then this will constitute its 'business connection' in India. SEP for this purpose is defined to mean: (i) transaction in respect of goods or services, or property carried by a NR in India if the aggregate payments arising therefrom exceeds prescribed threshold or (ii) systematic and continuous soliciting of business activities or interaction with prescribed number of users digitally. However, the thresholds for this purpose have not yet been notified and thus, this provision has not yet been operationalized.

The Bill proposes to postpone the applicability of this provision to April 1, 2021 keeping in mind that the OECD Report is due in December, 2020. Given that the CBDT had earlier sought for stakeholder's comments in respect of the thresholds for the number of users and the threshold for the aggregate payments, but has not yet notified those thresholds, the CBDT could be looking up to the OECD for some guidance in this respect. It would be important to see how the CBDT moves ahead post the OECD Report.

The Bill also proposes to amend the provisions for SEP from April 1, 2020 by replacing them with the amended provisions. As per the proposed amended provisions which are along similar lines as the existing ones, SEP would be triggered due to any 'systematic and continuous soliciting of business activities or engaging in interaction with users in India'. The requirement to have solicited customers through 'digital means' has been removed thereby widening the applicability of these provisions. The potential impact of this proposal could be significant, owing to the deletion of the terms of 'through digital means'. It would be critical to see if the government issues any clarification in this respect.

The Bill also proposes to introduce rules for attribution of income to SEP. It proposes to provide that income from advertisements that target Indian customers or income from sale of data collected from India or income from sale of goods or services using such data collected from India, would be regarded as being 'sourced' in India i.e. attributable to the activities carried out in India for the purpose of the SEP. The attribution rule proposed could have far reaching implications for the e-commerce players in India, however the interplay between the concept of SEP resulting in a taxable presence for a NR and PE under the DTAAs would be vital. It must be noted that, the provisions of the IT Act apply to the extent they are more beneficial than the provisions of the DTAA, thus, where the NR is a resident of a country with which India, has a DTAA, the concept of SEP and the attribution rule would not be relevant.

Having said this, the eligibility to claim benefits under the DTAA, assumes significance for such NR and, therefore, it would be critical to examine the facts and commercial background of proposed transactions to assess if they would satisfy the Substance Test under GAAR, and ascertain optimum risk mitigation strategy. Further the applicability of the Principal Purpose Test ("**PPT**") would also need to be seen, as it restricts the practice of 'treaty shopping' and use of aggressive transaction structures such as investment through tax-saving instruments if one of the purposes of an arrangement is to obtain tax benefit, then the arrangement fails the PPT, resulting in the benefit of the tax treaty being denied.

This amendment is proposed to be effective from April 1, 2021.

iii. Saving the FPIs from the Vodafone Tax Saga

Currently, investments made directly or indirectly by investors in Category-I and Category-II FPIs under the SEBI (FPI) Regulations, 2014 ("**2014 Regulations**") are exempted from the indirect transfer tax (i.e. Vodafone Tax). The 2014 Regulations have been repealed and replaced by SEBI (FPI) Regulations, 2019 ("**2019 Regulations**") whereby classification of the FPIs into Category I and Category II and Category III FPIs under the 2014 Regulations have been done away with in the 2019 Regulations. The Bill proposes to make consequential changes to the IT Act and extend the benefit of exemption from the indirect transfer tax to investors in the Category I FPIs under the 2019 Regulations.

The Bill also proposes to clarify that the exemption from indirect transfer tax provided to investors in FPIs under the erstwhile 2014 Regulations prior to their repeal. Thus relief in respect of the indirect transfer tax would continue to be available to such investments. However, it would be critical to note that the classification as Cat-I FPI under the 2019 Regulations is subject to certain conditions under the 2019 Regulations, where the FPI does not meet these conditions, it would be classified as Cat-II FPI. As the exemption from Indirect Transfer tax is not available to Cat-II FPIs under the 2019 Regulations, investments made by an investor in such FPI could attract the rigors of the Indirect transfer tax.

This amendment is proposed to be effective from April 1, 2020.

iv. Rationalization of capital gains provisions in case of segregated portfolios

SEBI had permitted the creation of segregated portfolios of debt and money market instruments by mutual fund schemes vide a circular dated December 28, 2018, whereby, all the existing unit holders in a scheme, as on the date of credit event are allotted equal number of units in the segregated portfolio as held in the main portfolio and on segregation (commonly known as 'Side Pocketing'). Side Pocketing is a procedure which allows mutual funds to set aside a certain number of units against bad debts held by them, with the objective of protecting investors' money during a debt crisis.

There was a lack of clarity regarding the date of acquisition for segregated portfolio units i.e. whether they would considered from the date on which segregation was done or the original date of investment. Similarly, the cost of acquisition of such units should be to be the original cost of acquisition instead of the proportionate cost on the date of segregation. Side Pocketing scheme proved to be counter-productive in light of the tax implications. Lack of clarity regarding taxation of Side Pocketing deals added to anxieties of the investor, who was unwilling to avail protection under this scheme.

In order to address the woes of the investors, the Bill proposes the following amendments to provide for clarity on computation of capital gains in relation to segregated portfolios permitted by the SEBI:

a. Amendment to sub-section (42A) of section 2 of the IT Act to provide that in the case of units in a segregated portfolio, the period for which the original unit or units in the main portfolio were held by the taxpayer, will be included in determining the period of holding of such unit of a segregated portfolio.

b. A new sub-section (2AG) to be inserted in section 49 of the IT Act to provide that cost of acquisition for units held under a segregated portfolio will be in the same proportion to the cost of acquisition of units in the total portfolio as the net asset value of the asset transferred to the segregated portfolio to the net asset value of the total portfolio immediately before the segregation of portfolios.

c. A new sub-section (2AH) to be inserted to provide that the cost of acquisition of the original units held by the assessee will be in the main portfolio will be deemed to have been reduced by the amount arrived under the new sub-section (2AG).

For instance, an investor invests in a scheme whose net asset value was INR 10 on October 1, 2017. On January 1, 2019, when the net asset value of the scheme was INR 40, segregation of portfolio was done. After segregation, the net asset value of the main portfolio was INR 30 and the segregated portfolio was INR 10 i.e. in proportion of 3:1. Accordingly, as per the proposed amendments, the cost of acquisition of the main portfolio and the segregated portfolio should be taken as INR 7.5 and INR 2.5, respectively and the date of acquisition of the units will be considered to be October 1, 2017.

The amendments aim to rationalize the provisions of the IT Act in relation to capital gains on segregated portfolios. This comes as a welcome move as the amendments not only provide clarity on computation of capital gains for units held in a segregated portfolio, but it will also allow the investors to claim lower capital gains tax rates, as gains arising on sale of units are likely to qualify as long term gains.

These amendments are proposed to take effect on April 1, 2019.

v. Royalty in respect of cinematographic films

Currently, the definition of 'royalty' under the IT Act excludes consideration received for sale, distribution or exhibition of cinematographic films. In view of the IT Act being more favorable than the provision in a DTAA in this regard, such royalty is not taxed in India even if the applicable DTAA allocates the right to tax such royalty, to India. However, the DTAA partners do not provide such reciprocity to Indian players receiving royalty in respect of cinematographic films. Therefore, it yields to a discriminatory treatment against Indian residents by such other countries.

The Bill proposes to amend the definition of royalty to include the consideration for the sale, distribution or exhibition of cinematographic films within the meaning of 'royalty' under the IT Act. The amendment would result in payments to any one including a non-resident, towards sale, distribution or exhibition of cinematographic films being taxed in India subject to the provisions of the applicable DTAA. The taxability of royalty towards sale, distribution or exhibition of cinematographic films under the IT Act under the proposed amendment would necessitate a careful assessment of the eligibility of such entity / individual to claim benefits under the DTAA. Having said this, one should be mindful of the substance of the transactions/ arrangements, any reliefs such as the narrower definition of the royalty under the DTAA would be subject to satisfaction of substance requirements under the respective tax treaties (if any) as well as the rigors of GAAR and PPT rules under the domestic law and MLI, respectively. Hence, it would be vital to assess the application of these provisions and ascertain the implications before undertaking any structuring, aimed at claiming benefit of narrower definition of royalty under the applicable DTAA. It should also be noted that the interplay of the DTAA and the IT Act, in this respect is also impacted by the most favored nation clause, whereby India would be required to offer a lower rate of tax or narrower scope of taxation of royalty, interest, dividends etc., if such treatment is agreed to under a subsequent DTAA with a member of the OECD.

This amendment is proposed to be effective from April 1, 2020.

vi. Taxpayer cannot claim FMV above circle rate of property under amended provisions of grandfathering

Presently, capital gains on sale of land or buildings or both **(“property”)** acquired before April 01, 2001 are grandfathered. In case of property acquired before April 01, 2001, the actual cost or the fair market value **(“FMV”)**, whichever is higher, could be taken as the cost of acquisition of such property for the purpose of computation of capital gains. It is worthwhile to note that certain taxpayers had earlier inflated the cost of acquisition by adopting higher values determined in the valuation report as FMV, which had resulted in reduction of capital gain income. In order to curb this practice, the Bill proposes to put an upper threshold on the FMV being claimed by a taxpayer, such that it shall not exceed the circle rate i.e. stamp duty value of the property.

This might also help in reducing litigation as it has often been seen that the tax authorities raise various doubts on the computation of FMV in the valuation reports obtained by the taxpayers from registered valuers basis the commercial prospects of the property and various other factors. It has also been observed that there is often a wide difference between the FMV adopted in the valuation reports vis-a-vis the valuation determined by tax department's valuation officers. Therefore, the instant proposal could reduce litigation on the matter to some extent.

It would be interesting to note that historically it has often been the case, more so around the relevant year i.e. 2001, that market prices of several properties were much higher than their circle rates. In such a case, even though it is the circle rate which is understated and needs revision, the taxpayer is now prevented from adopting the market price as the cost of acquisition as he is restricted to claim only the circle rate as the cost, despite the fact that the actual market prices were much higher.

This amendment is proposed to be effective from April 1, 2021.

vii. Restrictions placed on switch over between beneficial provisions i.e. section 12A/12AA and 10(23C)/10(46)

Under the existing provisions of section 11(7) of the IT Act, a trust or institution registered as charitable institution under section 12A/ 12AA of IT Act cannot avail the various exemptions provided for under section 10, other than section 10(23C). Since a trust or institution registered under section 12A/ 12AA is already availing these exemptions and are required to comply with the conditions provided under such sections, it was felt it should not have option of taking shelter under general exemptions of section 10 just because it couldn't comply with the specified conditions as it defeated the objective of having those conditions. Hence, section 10 exemptions were not provided to these institutions.

However, since section 11(7) expressly provided an exemption to institutions registered under section 10(23C), certain institutions were able to hold registrations both under section 10(23C) as well as under section 12AA. This option actually provided an arbitrage to such institutions to actually decide to claim exemption either under section 10 or under section 11 of the IT Act depending on their convenience and could opt to be registered under section 10(23C) in case they were not able to satisfy the conditions prescribed under section 12AA or vice versa.

The Bill proposes to amend section 11 so that only one mode of exemption is available at a time i.e. either registration under section 10(23C) or 10(46) or section 12AA (now 12AB). It provides that the registration under section 12AA (now 12AB\ shall become inoperative if a charitable trust or institution is already approved under section 10(23C) or 10(46) of the IT Act. Further restrictions are also proposed to be incorporated in the amended section 11 so that charitable institutions availing the benefit of provisions of section 10(23C) or section 10(46) would now be allowed to switch back, by registering under section 12AB, only once and as a consequence, the approval allowed under section 10(23C) or section 10(46) will now cease to have effect for the future years.

It may be noted that several educational institutions have availed registrations under both section 10(23C) as well as under section 12AA of the IT Act and were continuing to claim tax exemption even after one of registrations was revoked. The Bill proposes to expressly prohibit such shelter so that option of switching from one to the other.

The amendment is proposed to be applicable from June 1, 2020.

viii. Exemptions to charitable institutions now come with five year validity period

As per the existing laws, registration obtained by a charitable organisation remains valid until it is specifically cancelled or revoked by the tax authorities. It is now proposed that on a going forward basis, a newly set up charitable organisation, shall be granted a provisional registration for a period of three years and all charitable organisations, including the existing ones, shall be required to renew their registration every five years.

It is also proposed that once the newly set up charitable organisations complete their initial three years of existence, they would be required to obtain a fresh registration just like any other charitable organisation. The tax authorities may decide to do a detailed analysis of the objects and the activities of the institution before granting approval and upon satisfaction, registration granted to them shall be valid for a period of five years.

As discussed above, even the institutions which have already obtained approved under aforesaid sections, shall have to intimate the tax authorities regarding the status of their registration. The tax authorities shall re-scrutinize the activities of the trust based on the activities carried out in the past years. Upon satisfaction, a fresh approval will be granted for a limited period of five years starting from April 1, 2020.

The FM in her speech has proposed to make the process for registration for new and existing charitable institutions completely electronic in order to make the process simpler and transparent, which is a welcome step. Under this, a unique registration number shall be issued to all new and existing charitable institutions and avoid any face to face interactions with the tax authorities.

It may be noted that under the existing provisions of the IT Act, registration under section 10(23C) or section 12AA or section 80G is valid until it is revoked by the tax authorities. Henceforth, such registrations will be valid only for limited period of five years and will need to be renewed every five years, which would in turn would lead to scrutiny of transactions at every such renewal.

The amendment is proposed to be applicable from June 1, 2020.

ix. E-reporting of donor's details by donee, online matching with claim of donor

Under the current provisions of the IT Act, an institution which is eligible for deductions under section 80G is required to maintain proper records of its donation receipts, expenditures etc, along-with other records. The AO at the time of carrying out the assessment proceedings of such institutions, could summon such details for scrutiny and verification.

Similarly at the time of assessment proceedings of a donor, the donation receipts furnished by him could be cross checked by the AO by calling for records from the donee entity. However, this process being tedious and time taking was not resorted to on a regular basis as calling for records of donee by issuing them separate notices each time is not feasible. This has resulted in non-reconciliation of the donations received by the concerned donee with the amounts granted by the donors and there are reports that large scale tax evasion used to happen on account of this and unscrupulous taxpayers used to take undue advantage of this situation.

Hence, in order to streamline this entire process and increase transparency, the Bill proposes that an institution to which section 80G applies is now required to furnish a statement in respect of the donations received along-with donor's details to the tax authorities online, within prescribed timelines. It also proposes that failure on the same would also result in levy of a fee and penalty on the donee. The FM in her speech has said that the endeavour is to prefill the donor's information in his return for hassle free claim of deduction for donation. Thus, the process of one to one reconciliation of the donations received by the donees and the deductions claimed by the donors in their respective tax returns would get simplified and become even more efficient. Also, it will be easier to deal with the issue of fake donation receipts, wrong claim of deductions by taxpayers or proper records of donations not being maintained.

Considering that donations of very low value and from multiple donors are often received by many of these donee institutions, filing of such details within prescribed timelines could become an uphill task for them. Further, in case of any failure to furnish details on part of donee entity and the donor claiming a deduction in his return, one would expect the AO to rely on the donation receipts and other evidences furnished by a donor for granting deduction.

While it may create certain additional compliances for the charitable organisations, we believe that it is a step in the right direct direction to avoid any misreporting or tax evasion. Once the system stabilizes, as the FM stated, it will be a simple process by which the donor can get the requisite tax deductions without any undue harassment. Similarly, the donee organisation also should put its own affairs in order and maintain proper books of account so that it does not face any difficulty henceforth.

The amendment is proposed to be applicable from June 1, 2020.

x. Compliance relief for MSMEs

In its efforts to rationalize provisions in the IT Act, the Bill proposes to introduce amendments to help reduce compliance burden for small and medium enterprises. Presently under section 44AB of the IT Act, every person carrying on business is required to get their accounts audited if, their (i) total sales, (ii) gross receipts or (iii) turn over exceeds INR 10 million in any financial year.

The Bill proposes to amend section 44AB of the IT Act to increase the threshold l for getting a tax audit, in case of a person carrying on business, from INR 10 million to INR 50 million. This increased threshold is proposed to be applicable only if the following conditions are met:

a. Aggregate of all receipts in cash during the relevant financial year do not exceed 5% of the such receipt; and

b. Aggregate of all payments in cash during the relevant financial year do not exceed 5% of such payment.

Currently, certain provisions of the IT Act require the audit report to be filed with the returns. The Bill in order to enable pre-filling of returns, in case of tax payer having income from business or profession, proposes to amend these provisions to provide that the tax audit report should be furnished one month prior to the date of filling of return. Further, certain TDS/TCS provisions under sections 194A (interest other than interest on securities), 194C (payments to contractors), 194H (commission on brokerage), 194I (rent), 194J (fees for professional or technical services) and 206C (profits and gains from the business of trading in alcoholic liquor, forest produce, scrap, etc.) presently cross-refer to the thresholds in section 44AB of the IT Act to impose liability on persons in certain instances. Thus, the proposed change in the tax audit threshold would have a consequent effect of these provisions. Accordingly, the Bill proposes to amend these section to specify the threshold as INR 10 million or INR 5 million, as the case may be as against the current reference to section 44AB of the IT Act.

The FM in her budget speech highlighted the importance of the MSME sector in supporting a growing economy as they create jobs, innovate and take risks. In line with supporting these MSMEs, the Bill proposes these amendments to reduce their compliance burden. The reduction in the threshold for audit will reduce the cost of doing the business and permit entities to utilize the available resources in an optimal manner.

However, it is must be noted that this increased threshold is permitted upon fulfillment of certain conditions viz. cash receipts and cash payments cannot exceed 5% of the total receipts and total payments respectively. Therefore, impetus to increase investments in MSMEs provided in these amendments may have limited application. A more robust approach to development of digital infrastructure and guidance on adoption of technology in relation to MSMEs could have increased the scope of benefit sought to be accorded. The practical implementation of these amendments will provide further clarity on whether these amendments will have a significant impact on investments in MSMEs.

The amendments are proposed to take effect on April 1, 2020.

xi. Greater discretion accorded to board of companies

A return of income filed by a company is required to be verified in the manner prescribed under the IT Act. Presently, the return of income filed is to be verified by the managing director under section 140 of the IT Act. In the absence of the managing director or when the managing director is unable to verify the returns due to any unavoidable reason, any director of the company can verify the returns. The section also lists down instances where other persons are required to verify the returns filed by the company. For instance, in the event an insolvency resolution process has been admitted by the relevant adjudicating authority under the Insolvency and Bankruptcy Code ("**IBC**"), the return is required to be verified by the insolvency professional appointed by the relevant adjudicating authority.

Similarly, in case of a limited liability partnerships ("**LLPs**"), the return of income and return of fringe benefits must be verified by the designated partner. In the absence of the designated partner or if the designated partner is unable to verify the returns, any other partner may verify the returns. The Bill proposes to amend section 140 of the IT Act to provide that any other person as may be prescribed for this specific purpose could also verify the returns in the absence of the managing director or designated partner as the case may be.

This amendment is aimed at rationalizing provisions of the IT Act to ensure that tax compliance is convenient and straightforward. The process of verification can be quicker and done in a swift manner as companies and LLPs are given discretion and allowance to authorize a person who can verify the returns based on the organization's internal governance strategies. Further, the discretion accorded to the companies and LLPs will also enable companies to file returns in a timely and efficient manner without hassle. This will improve both compliance and ease of doing business. Authorised representatives of companies are required to appear before any Income-Tax authority or the appellate tribunal, on behalf of a company or LLP, in relation to any proceedings under the IT Act. Section 288, *inter alia*, lists the following persons as eligible to be an authorized representative: (i) a person related to the taxpayer in any manner or a person regularly employed by the taxpayer; (ii) any legal practitioner who is entitled to practice in any civil court in India; (iii) an accountant; and (iv) any officer of a Scheduled Bank with which the taxpayer maintains a current account or has other regular deal.

While the IBC empowers the insolvency professionals or administrators to exercise the powers of the board and by implication represent the company in such proceedings, section 288 of the IT Act does not explicitly provide the same in its current form. The Bill proposes to amend section 288 of the IT Act to enable any other person as may prescribed to appear as an authorized representative.

This amendment is aimed at rationalizing provisions of the IT Act and remove any ambiguity. The section in its present form used to create an ambiguity as to whether an insolvency professional can appear before the tax authorities or not. The amendment clarifies the powers of the company in determining who its authorized representative should be. This clarification will provide certainty and convenience in appearing before tax authorities in relation to any proceedings initiated under the IT Act.

These amendments are proposed to take effect on April 1, 2020.

VII. PREVENTING TAX ABUSE

i. Modifying tax residency provisions

An individual's residential status is determined based on his / her physical presence in India., one of the test for determination of residential status for an individual is the presence of the Individual in India for a period exceeding 60 days in the relevant FY and stay in India for a period of 365 days in 4 years preceding that year. For an Indian citizen and persons of Indian origin ("**PIOs**"), the period of 60 days is replaced by a period of 182 days, to provide relaxation to such persons to visit India for longer duration without levying the burden of tax due to becoming being treated as a resident of India.

The higher threshold of 182 days was being misused to enable PIOs or Indian citizens to carry out substantial economic activities from India and manage their stay to remain non-resident in perpetuity, consequently avoiding taxation of their global income in India. To curb such practice, the Bill proposes to decease the period of 182 days to 120 days.

Further, noting that high net worth individuals could be managing their affairs such that they are not liable to tax in any jurisdiction, the Bill proposes to include residuary test for residential status of an Individual. The Bill proposes that an Indian citizen who is not liable to tax in any other country by reason of domicile or residency or any other criterion of similar nature, would be deemed to be resident in India. In this respect, there were apprehensions and concerns among the NRIs that their global income could be subject to tax in India, by way of this proposed amendment, as the deeming provision treats such citizens of India as being 'resident in India'. Further, there were apprehensions that bonafide workers in a state where individual tax is not levied viz., the Middle East could be liable to tax in India on the income earned outside India. To dispel such concerns, and to avoid any mis-interpretations, the CBDT, vide their press release dated February 2, 2020, clarified that new provision is not intended to tax such Indian citizens who are bona fide workers in other countries. The press release further clarified in case of an Indian citizen who is deemed resident of India under this proposed provision, income earned outside India by such person shall not be taxed in India unless it is derived from an Indian source or business or profession being carried out from India. Accordingly, such persons who are deemed as residents of India, would be subject to tax in India on their income earned from India and their income from outside India shall remain exempt from tax in India.

Currently, with the intention to ensure that a non-resident is not suddenly faced with the compliance requirement of a resident merely having spent more than specified number of days in India during a particular year, the IT Act also provides for situations in which a person shall be 'not ordinarily resident' in the relevant FY. The extant provisions provide that if the person being an individual/ a Hindu Undivided Family ("**HUF**") whose manager has been non-resident in 9 (nine) out of the 10 (ten) FYs years preceding given FY, or has during the seven FYs preceding that FY been in India for an overall period of 729 days or less; such individual or an HUF shall be said to be 'not ordinarily resident' in India in a previous year. The Bill proposes to relax the threshold of (nine) out of the 10 (ten) FYs to 7 (seven) out of the 10 FYs, preceding the given year. Thus, an NRI returning to India, would not be subject to tax on income earned from foreign sources not received in India, till 4 years after becoming resident in India. This proposal would provide the returning NRIs with a longer period of time to decide if they would wish to stay in India, without burden of tax due to becoming being treated as an ordinary resident of India.

These amendments are proposed to be effective from April 1, 2020.

ii. Penalty for fake invoice

After the introduction of the GST regime, authorities have identified many instances of fake invoices being generated in order to fraudulently claim input tax credit and consequently reduce their liability under the GST regime. These fake invoices have been prepared with no actual delivery or receipt of goods or services by entities who do not carry on any business or profession.

In order to provide for harsher penalties for fake invoices, the Bill proposes to include a new section 271AAD in the IT Act. The new section 271AAD provides that if a person is found to have made a false entry or has omitted an entry relevant for computation of total income of such person, a penalty equal to the aggregate amount of false or omitted entries will be levied. Further, any other person who causes a person to make a false entry or omit an entry will also be subject to the same penalty. A false entry has been defined to include use or intention to use (i) forged document, falsified documents or a false piece of documentary evidence; (ii) invoice for supply or receipt of goods and services without actual supply or delivery of such goods and services; and (iii) invoice for supply or receipt of goods and services to or from a person who does not exist.

This amendment is proposed to be effective from April 1, 2020.

VIII. IMPROVING EFFECTIVENESS OF TAX ADMINISTRATION

i. Making way for faceless assessments and appeals

In consonance with its objective of easing the assessment process and promoting faceless assessments, the Finance Act, 2019, had introduced E-assessment Scheme, 2019, ("**the Scheme**") which was notified under section 143(3A) of the IT Act. Section 143(3A) gives the power to Central Government to notify schemes for assessing total income or total loss. The said Scheme was only limited to scrutiny assessments undertaken under section 143 of the IT Act.

The FM has expressed her intention to expand the scope of faceless assessments to include other forms of assessments as well as introduce electronic appeal mechanisms and suggested amendments to the IT Act to provide for the same.

In consonance with this intention, the Bill proposes to expand the scope of section 143(3A) to include notifying of schemes for assessments in relation best judgement assessment under section 144 of IT Act, where the assessment is done by the AO based on the information and documents already available with him. This would provide a channel to the Government to notify a similar scheme of faceless assessment for best judgment assessments as well.

In addition to best judgement assessments, the Bill also proposes to introduce electronic appeal mechanisms as well to setup channels to introduce faceless proceedings. As on date, appeals before the CIT(A) are required to be filed in an electronic mode, however, the entire process is yet to be streamlined in electronic mode. The Bill proposes to empower the Government to notify an e-appeal scheme. In order to ensure effective administration of the e-appeal at the first appellate level, the Government will also be empowered to pass any notification to direct that such provisions of the IT Act related to the jurisdiction and procedure for disposal of appeal may not apply or may apply with certain exceptions, modification or adaptations, as specified in the notification. The power to pass such notification shall be available only up to March 31, 2022.

Apart from making best judgement and first appeal process faceless, suitable amendments are also proposed under section 274 of IT Act, which will empower the Government to notify schemes in relation penalty proceedings as well. This would, in turn, provide a channel to the Government to prescribe electronic modes for conducting penalty proceedings as well.

The intent behind extending faceless assessment beyond scrutiny assessment proceedings is to bring greater efficiency, transparency and accountability to the assessment process and also to avoid any undue harassment by the taxpayer or its advisors in the hands of the concerned tax authorities. Currently, substantial functions of the Income Tax Department from filing of tax returns, processing of tax returns, issuance of refunds and scrutiny assessments have already been brought the purview of electronic mode of operation. The introduction of faceless appeals in other forms and assessments and appellate proceedings may further smoothen the process. The initiation of faceless appeal mechanism may further lead to reducing the pending litigation in a timely fashion.

This is very welcome change and one hopes that this addresses many grievances of the taxpayers. However, having said that, it also throws up several new challenges. For example, once the matter reaches the ITAT, how would evidence be furnished. How would the taxpayer claim that it had furnished all relevant evidences during the assessment proceedings before the AO or during the appellate proceedings before the CIT(A). As the assessment as well as the appellate proceedings were faceless, how would the requisite documents be verified by the tax authorities and what would be the process to be deployed by the ITAT. Will it be possible for the ITAT, being the final adjudicator of the facts, be the first entity to review the document from a manual perspective and how could it be able to manage the workload.

As discussed above, these are path-breaking changes and have been brought out to address the never ending pendency of tax litigation and it remains to be seen how far it is able to cope and is able to address this position.

ii. Stringent approvals

Furthering the agenda of taxpayer friendly regime, an important proposal made by the Bill was to introduce certain checks and balances on the power of tax authorities conducting survey operations. Section 133A of IT Act states that the no action of Survey under section 133A can be taken by the prescribed authorities without obtaining the approval of the Joint Director or Joint Commissioner.

The Bill proposes to further clarify that prior approval from a Joint Director or a Joint Commissioner is fine only if the relevant information that prompted the said Joint Director or the Joint Commissioner to allow a Survey operation to be carried out, is received from any prescribed authority. However, in case the said information is not received from any prescribed authority, no action can be taken by any Joint Director / Commissioner or Assistant / Deputy Director or Tax Recovery / Assessing Officer, unless an explicit approval is granted by a Director or Commissioner.

This is an important change and it is being proposed that the tax authorities are expected to act with a lot of restraint. There have been allegations that the investigation wing of the tax authorities are always with a trigger happy mode and they tend to work without any limitation to their authorities and many times without any basis. The fact that junior officers were allowed to authorize Survey operations was also cited by various agencies and parties. The proposed changes are expected to bring more sanity to the manner in which tax authorities used to function. The fact that a sanction can be granted only by a Commissioner or a Director level officer, seem to suggest that it is expected from such officer to exercise their rights with a significant amount of discretion and restraint and they would allow any Search operations to be carried out by the team only if they are themselves convinced about the merits of such operations.

This amendment will come into effect from April 1, 2020.

iii. Expanding the scope of DRP proceedings

Section 144C of the IT Act provides for filing of objections before the dispute resolution panels ("**DRP**") against the draft assessment orders of the AO. Currently, an eligible taxpayer can approach the DRP route under section 144C of the IT Act so long as either the Transfer Pricing Officer has passed an order under section 92CA(3) of the IT Act or if it is a non-resident company. The scope of the eligible taxpayer is proposed to be expanded and is expected to include non-corporate foreign taxpayer as well.

Further the Bill also proposes to amend section 144C to broaden the scope of DRP proceedings. Currently, a taxpayer can only approach the DRP against draft orders of AO where AO proposes any variation to the total income or loss of the taxpayer. However, the restriction of approaching on variation pertaining only to total income or loss has now been removed and, therefore, it is proposed to include any other kind of variation proposed by the AO, which is prejudicial to the interest of taxpayer, can also be taken by the taxpayer before the DRP.

This is an important change and should provide certain amount of comfort to the taxpayer because earlier, the taxpayer has no option but to approach the CIT(A) in case of certain amendments or revisions proposed by the AO which were not included within the scope of challenges that could be brought before the DRP. While the DRP process itself has not been very popular for the last few years ever since its introduction, especially because of lack of relief granted by the DRP, having no option other than approaching the CIT(A) did not augur well with many taxpayers. In addition to increasing its power of referral, it is highly anticipated that the CBDT will take certain measures to ensure that the DRP functions like a true appellate forum and is able to grant justice to the taxpayers in genuine cases. This will augur well for the tax litigation and dispute resolution process.

iv. Compulsory pre-deposit of 20% tax amount for stay from ITAT- no discretion clause in amended provisions

The AO has discretion to grant stay on collection of disputed taxes from the taxpayer, while the order raising demand is being disputed by the taxpayer before the CIT(A). In order to streamline the procedure for grant of stay and in the absence of any specific provisions in the statute, CBDT laid down specific guidelines for the AO vide Instruction No. 1914 dated March 21, 1996, partially modified by Office Memorandum ("**OM**") dated February 29, 2016 and OM dated July 31, 2017. Vide the aforesaid, AO now has discretion to grant stay on the collection of disputed tax amounts during the course of pendency of appeal before the CIT(A) so long as the taxpayer is willing to pay at least 20% of the disputed tax amount. The OM also provides that the taxpayer may be eligible to obtain stay for an amount lower than 20% of the disputed tax amount, so long as a genuine case is made for such lower payment of disputed taxes on the basis of specific facts and circumstances and also by approaching the CIT/ Principal CIT.

In case where an appeal was pending before ITAT, as per the existing provisions, it is possible for the taxpayer to get a complete stay from collection of taxes by establishing its *prima facie* case on merits and the financial difficulties. For instance, in a number of cases, the ITAT had granted complete stay to the taxpayers when the jurisdictional High Court had already decided the issue on merits in favor of the taxpayers.

The Bill proposes to make the current provisions of IT act stringent by providing that ITAT can grant a stay only on pre-deposit of at least 20% of disputed tax demand or by furnishing security of equivalent value.

It is worthwhile to highlight that the Hon'ble Supreme Court in the case of ***LG Electronics India Pvt. Ltd.***[3] had held that the Oms / circulars issued by the CBDT will not be a fetter for the Commissioner to carry out its quasi-judicial functions and specifically clarified that they have wide powers as a quasi-judicial authority to grant stay on payment of an amount less than 20% of disputed tax demand in specific instances.

The amendment proposed by this Bill once incorporated into the Act will overrule the rationale of the aforesaid decision of the Supreme Court and the tax authorities could argue that the aforesaid decision of the SC is no longer valid law in lieu of the proposed changes. Accordingly, the taxpayers may have to mandatorily deposit at least 20% of the disputed tax amount in order to obtain a stay from the ITAT. Hence, even in deserving cases, the ITAT no longer would have any discretion to grant a stay on the whole disputed tax demand. This could impose significant financial burden on taxpayers and could severely impact their cash flows, especially in cases of high pitched assessments. In some specific situations, it is possible that due to high pitched assessments, where the disputed tax demands may be much higher than the possible turnover of the taxpayer, requiring such entities to mandatorily deposit at least 20% of the disputed tax amount could threaten the liquidity and in extreme cases, continuity of taxpayer's business.

Despite repeated assurances from the government of making the present tax regime more taxpayer friendly, such measures could put a further dent on the financial health and trust of the taxpayers. Over the last few years, in most of the pending tax appeals, the taxpayer realistically expects any substantial relief only at the ITAT level. The fact that the ITAT is the first independent quasi-judicial forum and is generally accepted as an independent and honest forum from where the taxpayers could expect their genuine grievances could be heard, through this introduction, he Government seems to have taken away an extremely important tool from the ITAT, which may cause irreparable damage to the ITAT as well as to India as a country. It is hoped and expected that either provision shall be withdrawn or at least adequate safeguards are built so that the ITAT does not lose its ability to grant relief in genuine cases.

[3] PCIT v. LG Electronics India Pvt. Ltd. Civil Appeal No. 6850 of 2018.

This amendment is proposed to be applicable from April 1, 2020.

v. A Taxpayer's Charter Act to formalize the rights of taxpayers

In a landmark decision, with an intention to enable and foster trust between taxpayers and tax administration, the FM has proposed a clear enumeration of the rights of taxpayers to be legislated. The Bill proposes that CBDT shall adopt a Taxpayer's Charter and shall issue orders, instructions, directions or guidelines for its implementation. A formal statement of the taxpayer's rights in the Charter shall be a very welcome change as it would obligate the tax authorities to be mindful of taxpayer's rights when they exercise their powers or carry out proceedings under the IT Act. It is also pertinent to note that by legislating this provision, it also exposes the Government to judicial scrutiny because an aggrieved taxpayer may take the Government to the court in case he believes that he is not being pursued in accordance with law and his rights have been violated.

With the rights of the taxpayers as well as the duties and obligations of CBDT being legislated, the Government also hopes that it could help in assuring the taxpayers that they will be free from harassment of any kind henceforth and the Government cares for them.

However, it would be too soon to predict the level of commitment that would be shown by the tax authorities in upholding such a charter of taxpayer's rights because they have been notorious and have gone to great lengths to make a case or defend a case against the taxpayers, causing them great inconvenience. It will also be interesting to see once the formal charter is released and the first set of directions or guidelines are open for public debate. Having said that, it is also pertinent to note that Indian society is changing and it is hoped and expected that both the taxpayers and tax administrators behave in a reasonable way, keeping with the spirit with which the charter has been set out, as it could probably set the tone for the functioning of the tax authorities in the coming years.

vi. FM tries to bring back "Acche din" for taxpayers, announces tax amnesty scheme for direct taxes

To augment tax collection and give a breather to taxpayers from their pending litigation, the FM in her speech has announced a new and novel '*Vivad Se Vishwas'* scheme. In this regard, The Direct Tax Vivad se Vishwas Bill, 2020 (**"Vivad se Vishwas Bill")** also got introduced in the Lok Sabha on February 5, 2020. Under the proposed scheme, taxpayers will get a limited time opportunity to settle their pending tax disputes by paying the full disputed tax amount on or before March 31, 2020 to get a complete waiver of interest and penalties.

<u>Features of the proposed scheme:</u>

Under the proposed scheme, a taxpayer can avail the scheme by paying the following amount, before March 31, 2020:

- the amount of disputed tax, without interest or penalty, or
- in case the dispute is on the amount of penalty or interest, 25% of the same.

In case the taxpayer is unable to make the payment by March 31, 2020, he can avail another opportunity by making the following payments (which is slightly higher than the original amount) so long as the payment is made on or before a "last date":

- 110% of the disputed tax, without interest or penalty (the excess 10% shall be limited to the amount of related penalty and interest, if any), or
- in case the dispute is on the amount of penalty or interest, 30% of the same.

While a specific last date has not been incorporated in the Vivad se Vishwas Bill and it will be notified by Central Government, the FM in her Budget Speech mentioned that such last date would be June 30, 2020, though one should still wait for a formal notification in this regard.

The proposed scheme can be availed by the taxpayer in respect of any appeal pending before the CIT(A)/ ITAT/HC/SC. Section 4(2) of the Vivad se Vishwas Bill specifically provides that an appeal filed by tax authorities before the CIT(A) and ITAT falls within the ambit of the proposed scheme. Similarly, the *'Statement of Objects and Reasons'* annexed to the Vivad se Vishwas Bill suggests that the taxpayer can avail the proposed scheme even before the appeals pending before HC/SC. Further, in case arbitration proceedings have been instituted with any foreign jurisdiction or notice has been issued by the taxpayer in relation thereto, the same need to be withdrawn before applying for the proposed scheme.

That an appeal before the CIT(A)/ITAT/HC/SC should be pending as on a specified date i.e. January 31, 2020 for the proposed scheme to be applicable as per the *'Statement of Objects and Reasons'* annexed to the Vivad se Vishwas Bill.

The proposed scheme does not cover the cases that pertain to:

a. search or seizure,

b. where prosecution has been instituted for an AY,

c. undisclosed foreign income or foreign assets,

d. where proceedings are being carried out on basis of information received from a foreign jurisdiction under tax treaty, or

e. where notice of enhancement under section 251 has been issued by CIT(A).

Further, the proposed scheme cannot be availed by any person:

a. where an order of detention has been passed against such person under Conservation of Foreign Exchange and Prevention of Smuggling, Activities Act, 1974, or

b. in respect of whom proceedings for prosecution for any offence have been instituted under the specified Acts or he has already been convicted under such laws.

In cases where declaration filed by the taxpayers is found to be incorrect/violates conditions prescribed under this scheme, appeals shall get revived.

It seems taxpayers who are facing any proceedings under Indian Penal Code and other laws[1], even if they are unconnected to the offences prescribed under the IT Act, may not be able to avail the benefit of this amnesty scheme. It may be noted that this restriction was not placed on the similar amnesty scheme, Sabka Vishwas (Legal Dispute Resolution) Scheme, 2019, for indirect taxes introduced last year.

Another aspect which needs attention is that those cases in which draft orders have been passed by the AO making certain additions and an assessee has filed objections before the Dispute Resolution Panel ("**DRP**") instead of filing an appeal before the CIT(A), will not get the benefit of the proposed scheme. While the proceedings before the DRP cannot be technically called as an appeal, it must be noted that the directions issued by the DRP are binding on the AO. Further, the taxpayer can only file an appeal before the ITAT against the final order passed by the AO but not before the CIT(A). Therefore, the benefit of this amnesty scheme should have been provided to the proceedings pending before DRP as well.

<u>Expectations from the proposed scheme:</u>

Taxpayers looking for relief from their legacy tax issues which have been long pending at various appellate levels may choose to opt for this scheme. Especially in cases where the interest and penalty itself would be an estimated three to four times of the tax liability or even more. Even reluctant taxpayers who are hopeful of obtaining relief in their legacy matters, but have been waiting for many years for their day in the court, might opt for the scheme on further evaluation of their overall prospects.

This scheme would not only reduce the blocked tax amount for the tax department and enhance tax collections, but would also release a lot of stress on resources of taxpayers. Further, it would also be beneficial for the taxpayers who are looking to enter into mergers and acquisitions activities where pending tax demand can cause the transaction to be void under section 281 of the IT Act. More importantly, it would free a significant amount of bandwidth for the tax administration because of the representations that have to be made by the tax department in respect of cases pending for resolution at multiple levels.

However, it seems that taxpayers have not been allowed sufficient time to take a balanced decision or arrange for the required funds, especially in case of high pitched assessments as the first deadline is merely two months away from the date of presentation of budget. It may have been a better

[1] the Unlawful Activities (Prevention) Act, 1967, the Narcotic Drugs and Psychotropic Substances Act, 1985, the Prevention of Corruption Act, 1988, the Prevention of Money Laundering Act, 2002, the Prohibition of Benami Property Transactions Act, 1988.

move to allow taxpayers some additional time to analyse their tax position in India in a more comprehensive manner. The last date of the scheme as mentioned by FM in her speech seems to be June 30, 2020 though a specific date is yet to be notified by the Central Government.

Recommendations:

For now the government might succeed in giving burial to certain long-pending tax disputes, but one should not lose sight of the fact that substantial tax issues and controversies will remain unresolved as a result of withdrawal of cases. Had the litigation process been faster and smoother, such backlog of cases and blockage of consequent tax amount would not have happened in the first place. Hence, going forward it is important that the deficiencies in our litigation system be recognized and resolved. The concerned authorities need to acknowledge that systematic improvements are required so that tax disputes get concluded on their merits only and in a more timely fashion so that such amnesty schemes remain an exceptional measure and only a measure of last resort. In this regard, the following aspects shall have to be examined:

a. There is a tendency of the taxpayer as well as tax authorities to continue with a litigation because neither side wants to give up on what they believe is their entitlement. The tax authorities are also afraid that they will be hauled up by the CAG in case they decide not to file an appeal based on merits of their case;

b. The cases tend to become repetitive because if an adjustment is made for one year, unless that addition has been ruled as illegal, the same addition is made year after year;

c. There is a huge shortage of infrastructure with the judiciary to deal with the ever increasing pending tax cases;

d. There is a lack of trust on the taxpayers by the tax authorities and genuine *bonafide* statements provided by the taxpayer are ignored;

e. There is a lack of coordination among tax authorities in relation to pending tax cases because most of the times, the arguing counsels are not briefed appropriately;

f. No ABC analysis of pending cases are done by the tax authorities and hence, even very important and strong cases are not dealt with the adequate importance they deserve; or

g. Selection of arguing counsels also does not always happen on merits, etc.

On account of some of the aforementioned shortcomings, litigation does not always yield appropriate results for the tax authorities. Tax authorities should be well advised to litigate cases only on merits and it should be incumbent on the government to support well intentioned decisions taken by the tax authorities. It is hoped and expected that the Government will take a serious look at some of the above referred issues and come up with a plan so that the litigious issues get settled in a timely and meaningful manner instead of getting dragged on for years, and losing their purpose.

SECTION B:

ANALYSIS OF PROPOSED CHANGES IN INDIRECT TAX

I. SUBSTANTIVE CHANGES IN GST

i. Definition of "Union Territory" expanded

The Bill proposes to expand the scope of the definition of Union Territory, as defined under Section 2(114) of the CGST Act, and the corresponding section of the UTGST Act, in keeping with the Jammu and Kashmir Reorganization Act, 2019 as well as the Dadra and Nagar Haveli and Daman and Diu (Merger of Union territories) Act, 2019.

In line with the amendment to make the CGST Act applicable to the state of Jammu and Kashmir due to the abrogation of Article 370 of the Constitution of India, the Bill also proposes to amend Section 109 of the CGST Act to allow creation of a bench of the Appellate Tribunal in Jammu and Kashmir and Ladakh.

ii. Harmonization of the eligibility criteria for opting for Composition levy

The Bill proposes to amend Section 10(2) of the CGST Act to restrict the ambit of the composition scheme to exclude (i) persons who are also engaged in making supply of services not leviable to tax under the CGST Act; and (ii) persons who are engaged in inter-state outward supply of services, or supply of services through an electronic commerce operator, and to harmonize the conditions of eligibility for opting for two composition schemes provided under Sections 10(1) and (2A) of the CGST Act, respectively.

iii. Input Tax Credit

a. *Delinking of availment of ITC pertaining to debit note from the date of underlying invoice*

Section 16(4) of the CGST Act disallowed availing of ITC in respect of any invoice or debit note after the due date of furnishing the annual return or return for the month of September following the end of the financial year to which such invoice or invoice relating to the debit note pertained. Therefore, the suppliers could not claim ITC on account of price adjustment or delayed payment post such dates, where the invoices pertained to the previous financial year.

The Bill proposes to delink the issuance of debit notes and invoices. Therefore, the eligibility of input tax credit in respect of debit notes shall be analyzed basis the date of issuance of debit note instead of the underlying invoice. For instance, if the invoice for a supply was issued in November 2017, while the debit note was issued in August 2018, the last date to avail the credit would be the earlier of the following: (i) the due date to file the annual return of FY 2017-18; or (ii) the due date to file the return of September 2018. There was no consideration of the fact that the debit note was issued in FY 2018-19. However, the amendment takes the date of issue of the debit note into consideration and therefore, the last day to avail the credit in the abovementioned scenario would be (i) the due date to file the annual return of FY 2018-19; or (ii) the due date the return of September 2019.

This provides a semblance of relief to the taxpayers as they can now avail ITC for payments made against debit notes, even where the corresponding invoices were issued during the previous financial year.

b. *Amendment to transition provisions*

The courts have seen an increase in litigation challenging the transition provisions on account of differential treatment given to credits pertaining to certain cesses, inability of taxpayers in claiming certain credits on account of technical glitches and procedural lapses, etc., even after the expiry of the deadline for filing the TRAN-1 forms. The courts have also been pragmatic and inclined to grant relief in such matters.

The Bill proposes to retrospectively amend Section 140 of the CGST Act w.e.f. July 1, 2017 to allow providing of time limit as well as to lay down the manner for availing ITC against such unutilized credit under the erstwhile regime. It appears that the said proposal is intended to streamline interpretations adopted by the High Courts in relation to transitional arrangements for credits. However, it is likely that the proposed amendment is challenged given its retrospective applicability two and half years after implementation of GST.

iv. Cancellation of Registration

Section 29 (1) (c) of the CGST Act allows cancellation of registration for persons who are no longer liable to be registered under Section 22 (normal registration) and Section 24 (compulsory registration) of the CGST Act. However, the provision failed to allow cancellation of registration by a person who had voluntarily registered under the CGST Act.

In order to rectify this oversight, the Bill proposes to amend Section 29(1)(c) of the CGST Act to allow an application of cancellation by persons who registered voluntarily under Section 25(3) of the CGST Act.

The Bill also proposes to amend Section 30(1) of the CGST Act, to provide additional relief to the taxpayers by empowering the jurisdictional tax authorities to extend the period provided to file an application up to 90 days [(i) extended for 30 days by the Additional/ Joint Commissioner; and (ii) for a further period of 30 days by the Commissioner], on sufficient cause being shown by the taxpayer.

v. Empowering Government to make rules

a. Tax invoices

The Bill proposes to substitute the proviso to Section 31(2) of the CGST Act and empower the Government to notify the categories of goods or supplies in respect of which a tax invoice shall be issued and specify the time and manner of its issuance. The amendment is likely to provide the necessary powers to the Government for introducing rules in relation to electronic invoicing.

b. TDS certificates

In terms of Section 51 of the CGST Act, the Government departments/ local authorities/ governmental agencies ("**Deductor**") are required to deduct tax at source from payments made to taxable persons whose total value of supply under a contract exceeds INR 2,50,000/-. The deductor is required to issue a certificate in terms of Section 51(3) of the CGST Act, mentioning the contract value, rate of deduction, amount deducted, amount paid to the Government.

The Bill proposes to delete and replace the aforesaid provision to empower the Government to make rules to provide for the form and manner in which a TDS certificate may be issued. It seems that the proposal has been introduced to reduce the additional burden of issuing GSTR-7A on the Deductor and to make available a facility of downloading such form once the deductee accepts the tax deductions on the portal.

Further, Section 51(4) of the CGST Act imposed a late fee of INR 100 per day on failure to issue a certificate within 5 days of crediting the TDS amount. The Bill proposes to remove such late fee.

vi. Penalty and Prosecution

a. Imposition of penalty on beneficiaries

Section 122 of the CGST Act imposes penalty on a taxable person for the commission of an offence or omission of certain acts. The Bill proposes to introduce a new sub-section to impose a penalty of an amount equal to the tax evaded/ITC availed on a beneficiary of a transaction, if the transaction was conducted at his instance, in the following situations:

- If supply is made without issue of invoice or by issuance of false invoice;
- If invoice is issued but corresponding supply is not made;
- If ITC is availed by the taxpayer without actual receipt of goods and/ or services; or
- If ITC is taken or distributed in contravention of the law.

This insertion would discourage tax evasion by keeping a check on fictitious transactions.

b. Offence of fraudulent availment of ITC cognizable and non-bailable

Section 132 of the CGST Act provided for punishment to the person who actually commits the offence, in the form of imprisonment.

The Bill proposes to widen the applicability of the section to include persons, who cause the commissioning of the offence and retain benefit out of it. Further, the Bill also proposes to make the offence of fraudulent availment of ITC without an invoice or a bill, a cognizable and non-bailable offence.

In view of the restriction imposed in respect of availment of ITC, wherein the recipient of the supply can avail only 10% of the input tax credit in respect of such invoices which are not auto-populated in GSTR 2A and the power available to the officer to block credits and arrest in case wrongful availment of ITC, the proposed amendment appears to be excessive, more so in the view of decriminalization of corporate tax and Vivaad se Vishvas scheme.

vii. Amendment to Schedule II

Schedule II to the CGST Act provides a list of activities that are deemed to be categorised as supply of goods or supply of services. Paragraph 4 provides that any transfer of business assets or their private use or use for non-business purposes; whether or not made for consideration, would be a supply. However, Schedule I to the CGST Act provides that only permanent transfer/ disposal of business assets made without consideration would be treated as supply. This resulted in a potential misinterpretation of the provisions by the GST authorities who sought to demand tax on temporary transfer of business assets even when no consideration was involved.

The Bill proposes to delete retrospectively the words "whether or not for consideration" w.e.f. July 1, 2017. Therefore, only those transfers or use of business assets would be taxable that are made for consideration.

viii. Extension of time limit provided for removal of doubts

The Bill proposes to extend the time limit from three years to five years provided for passing of order by the Government on recommendation of the GST Council to remove the difficulty arising in giving effect to the provisions of the CGST Act. The proposal will enable the Government to further effectively streamline the GST legislations.

The Bill proposes similar amendment in the IGST Act, UTGST Act and GST (Compensation of States) Act, 2017.

ix. Disallows refund of accumulated credit of compensation cess

The Bill proposes to disallow refund of accumulated credit of compensation cess on account of inverted duty structure in relation to tobacco products retrospectively w.e.f. July 1, 2017. This is based on the recommendation of the 37th GST Council Meeting.

II. CHANGES IN GST RATES

i. Retrospective amendment of GST rates

Owing to the confusion in the tax rate applicable on fishmeal (HSN 2301) and on Pulley, wheels and other parts which were used as parts of agricultural machinery (HSN 8483), the Bill proposes the following amendments to the tax rates for a specified period, to provide relief to the industries:

Description	Heading	Applicable Rate (during the specified period)	New Rate	Period
Fishmeal	2301	5%	Exempt	July 1, 2017-September 30, 2019
Pulley, wheels and other parts of agricultural machinery	8483	28%	12%	July 1, 2017-December 31, 2018

The Finance Bill also proposes that refund for any of the abovementioned products will not be granted, if tax has already been discharged during such period. The proposed amendment puts taxpayers who have already paid taxes in view of the clarifications in a disadvantageous position.

The Bill proposes similar amendments under the IGST and UTGST legislations.

The aforesaid amendments in the GST legislations shall come into effect from the date when the Finance Act is notified.

III. SUBSTANTIVE CHANGES IN CUSTOMS ACT

i. Power to prohibit import/export of any goods

The Bill proposes to amend Section 11 of the Customs Act to empower the Central Government to absolutely or conditionally prohibit import/ export of any goods in order to prevent injury to the economy of India by their uncontrolled import/ export. This provision was earlier applicable only to imports/ exports of gold and silver.

This amendment would potentially empower the Central Government with discretionary powers and enable it to impose sanctions on import/ export of certain products by circumventing the procedure of anti-dumping / safeguard /countervailing investigations.

ii. Removal of time limit for adjudication

The Bill proposes to substitute Explanation 4 to Section 28 of the Customs Act, retrospectively from March 29, 2018 to remove the definite time period for determining the duty and interest liabilities for SCNs issued prior to March 29, 2018, which was inserted *vide* Finance Act, 2018.

This amendment would bring uncertainty in the resolution timelines for SCN issued prior to March 29, 2018 which may now become a long drawn adjudication proceeding. While the Government is trying to reduce the number of pending litigation to reduce the timelines of pending adjudication, such change in law may lead to further delay in adjudication process.

iii. Widened scope of recovery of duties

Section 28AAA of the Customs Act provides for the recovery of duties paid using instruments obtained under the Customs Act or FTDR Act by means of collusion or willful misstatement or suppression of facts. The said provision provides for recovery of such duties from the person to whom the instrument was issued, where such instrument was utilized for payment of duties by another person.

The Bill proposes to include instruments issued under any scheme of Central Government or any other law within the ambit of the said provision. The scope of instruments is also proposed to be expanded to include duty credit issued under the Customs Act.

With proposals for widening of the ambit of recovery proposals, the Government seems to be determined to prevent tax evasion.

iv. Stringent procedures under preferential trade agreements

The Bill proposes to introduce Chapter VAA of the Customs Act incorporating procedural compliances for an importer intending to avail benefit of preferential rates in terms of a trade agreement, namely:

a. Filing a declaration that the subject goods qualify as originating goods for preferential duty;

b. Ensuring that he is in possession of sufficient information regarding the manner in which country of origin criteria is satisfied for such goods;

c. Furnishing such information as would be prescribed in the rules (to be notified); and

d. Exercising reasonable care as to the accuracy and truthfulness of information furnished.

The burden of proving that goods qualify as originating goods for preferential rate of duty would rest on the importer and submission of certificate of origin ("**COO**") would no longer be conclusive evidence of origin of imported goods. .

Additionally, it would empower the proper officer to seek additional information from the importer and where such information is not furnished, or temporarily suspend preferential treatment during the course of verification. The limitation for sending a request for information for verification is proposed to be 5 years from the date of claim for preferential treatment or as provided in the trade agreement.

The provisions would also provide for the following:

a. Disallowance of a claim for preferential rate of duty, without further verification, on the basis of information furnished / available or on relinquishment of such claim by the importer,

b. Clearance of suspended goods on furnishing a security amount equal to the difference between the provisionally assessed duty and the preferential duty claimed or by depositing the differential amount in the electronic cash ledger,

c. Mandatory requirement of jurisdictional officer to intimate the issuing authority of the COO of the reasons for temporary suspension,

d. Restoration of the preferential tax treatment on receiving additional information, and

e. Imposition of rejection on identical goods from same producer or exporter, in absence of sufficient information pertaining to fulfillment of COO criteria.

Moreover, a non-obstante provision has been proposed to refuse preferential treatment for imported goods without verification in the following cases:

a. Tariff item of such goods is ineligible for preferential treatment;

b. Absence of complete description of goods in the COO;

c. Lack of authentication of issuing authority on any alteration of COO; and

d. COO is produced after period of expiry.

Goods imported on a claim of preferential rate of duty are also proposed to be made liable for confiscation where the provisions pertaining to such claim or prescribed rules are contravened.

Corresponding amendments have also been proposed to Section 156 of the Customs Act in order to enable the Central Government to make rules in this respect.

Although, the said provision have been introduced to restrict wrongful availment of benefits of preferential tax treatment under trade agreements, such wide powers may result in inadvertent delays in clearance of goods. The provision also raises concerns of potential misuse and harassment as "reasonable care" has not been defined in the Customs legislations and the imported goods may get confiscated on mere suspicion.

v. Issuance of electronic duty credit

The Bill proposes to empower the Government to issue and maintain duty credits through a customs automated system in an electronic duty credit ledger, in lieu of:

a. Remission of any duty or tax or levy, chargeable on procurement of material used in manufacturing / processing of goods or for carrying out operation of goods that are to be exported;

b. Other financial benefits, subject to certain conditions and restriction.

Such duty credits could be utilized for making payments of custom duty by the person to whom they are issued or to the person to whom they are transferred. The manner of utilization of such credits is yet to be prescribed.

Corresponding amendments are also proposed to Section 157 of the Customs Act to enable the CBIC to make regulations in this regard.

The said amendment is expected to digitalize the record keeping and utilization processes for incentives granted under the Customs Act.

The aforesaid amendments in the Customs Act shall come into effect from the date when the Finance Act is notified.

IV. SUBSTANTIVE CHANGES IN THE CT ACT

i. Amendments to curb imports

a. Safeguard Measures

The Bill proposes to substitute Section 8B of the CT Act to empower the Government to impose additional safeguard measures, including tariff rate quota or any other measures as deem appropriate in addition to the safeguard duties, to curb the increased quantity of imports causing serious injury to domestic industry. The proposed Section 8B of the CT Act also provides the procedure and the manner of imposition of additional safeguard measures. Such changes shall come into effect from the date when the Finance Bill gets notified.

With proposals to bring additional measure to safeguard the domestic industry, the Government seems to be determined to prevent any injury to domestic manufacturers.

b. *Circumvention rules for anti-dumping and countervailing duties*

The Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on subsidized Articles and for Determination of Injury) Rules, 1995 ("**Counter-vailing Duty Rules**") and the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ("**Anti-dumping Rules**") are amended to extend the power of the Government to investigate in the Anti-dumping Rules cases of circumvention of duties under the said Rules.

The investigation under the aforesaid Rules can now be initiated in case of any change in the pattern of trade, as a result of a practice process or work, as specified under the amended provisions, for which there is no sufficient cause or economic justification.

The notifications also insert certain definitions and explanations to provide clarification in relation to various provisions under the aforesaid rules, such as, related party transactions, period of investigation, etc. These changes shall be effective from February 02, 2020.

The changes introduced would strengthen the anti-circumvention measures by making them more comprehensive and wider in scope and in line with the best international practice.

V. CHANGES IN RATES OF CUSTOMS DUTY ON VARIOUS GOODS

i. Introduction of Health Cess

The Bill has introduced a levy of Health Cess at the rate 5% on the import of specified medical devices, such as, mechano-therapy appliances, massage apparatus, oxygen therapy apparatus, breathing appliances, masks, etc., w.e.f. February 2, 2020. Medical devices exempted from the levy of BCD will not be subject to Health Cess. Additionally, no credit shall be available on the payment of Health Cess.

The Health Cess would be used for promoting and financing the health infrastructure and services in India.

ii. Changes in Social Welfare Surcharge

Import of various goods *inter-alia* including specified food items, marbles, tiles and completely built up commercial vehicles are now exempted from the levy of Social Welfare Surcharge.

However, such exemption on specified goods falling under the headings, office and electrical machinery and equipment, photographic, cinematographic, measuring, checking, precision, medical and surgical equipment, are withdrawn w.e.f. February 2, 2020.

iii. Exemption to Defence Sector

Import of specified military equipment by the Defence PSUs or PSUs for Defence Forces has been exempted from the levy of customs duty.

iv. Withdrawal of BCD exemption

The Budget also withdraws the exemption of BCD on import of various products in the agricultural, fishery, hydrocarbon, chemicals and electronic machinery sectors.

v. Rescinding of redundant notifications

The Budget has rescinded various notifications which are no longer relevant or have become redundant, such as, notification to provide exemption of customs duty on import of specified goods for organising the Common Wealth Games, 2010, notification to provide exemption of customs duty on import of equipment required for the setting up of Rihand-Sasaram- Biharshariff HVDC Link by M/s. Power Grid Corporation of India, etc.

vi. New Tariff Classification

Four new tariff items have been introduced in the First Schedule of the CT Act to provide specific classification for wall fans, open cells for television sets, solar cells, not assembled and solar cells assembled in modules or made up in panels.

vii. Rate changes

a. The First Schedule to the CT Act has been amended to revise the BCD rates on various finished goods, with immediate effect from February 2, 2020. Further, certain amendments to prune the exemptions provided on import of goods, have also been introduced through notifications. These changes have been made effective from February 2, 2020, unless specifically mentioned in the table. Item wise changes in rates of duty have been tabulatized as below:

Sr. No.	Description	Pre-Budget rate	Post Budget rate	Change
	Food Processing			
1.	Walnuts, shelled	30%	100%	↑
	Fuel, Chemicals and Plastics			
2.	Other Chemical products and preparations of the chemicals or allied industries, not elsewhere specified	10%	17.5%	↑
3.	Very low Sulphur fuel oil meeting ISO 8217:2017 RMG380 Viscosity in 220-400 CST standards/ Marine Fuel 0.5% (FO)	10%	Nil	↓
4.	Calcined Petroleum Coke	10%	7.5%	↓
5.	Colloidal precious metals; compounds of precious metals; amalgams of precious metals			
6.	Butyl Acrylate	5%	7.5%	↑
7.	Polyester Liquid Crystal Polymers (LCP) for use in manufacture of connectors	7.5%	Nil	
8.	Calendared plastic sheets for use in manufacturing of smart cards	10%	5%	↓
	Footwear			
1.	Footwear	25%	35%	↑
2.	Parts of footwear	15%	20%	↑
	Household Items			
3.	Tableware, kitchenware, water filters (of a capacity not exceeding 40 litres) and other household articles, of porcelain of china, ceramic tableware, clay articles and household articles, glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018)	10%	20%	↑
4.	Table kitchen or other household articles and parts thereof, of iron or steel, iron, steel wool, copper or aluminum; pot scourers and scouring or polishing pads, gloves and the like, of iron, steel, copper or aluminum, including pressure cookers pans utensils and misc. articles such as iron & steel wool, polishing pads, gloves etc.	10%	20%	↑

Sr. No.	Description	Pre-Budget rate	Post Budget rate	Change
5.	Padlocks and locks (key, combination or electrically operated) of base metal; clasps and frames with clasps, incorporating locks of base metals; keys for any of the foregoing articles, of base metals (other than lock of a kind used for automobiles.)	10%	20%	↑
6.	Brooms, brushes, hand operated mechanical floor sweepers, not motorized, mops and feather dusters; prepared knots and tufts for broom or brush making; paint pads and rollers; Squeegees (other than roller squeegees)	10%	20%	↑
7.	Hand sieves and hand riddles, combs, hair-slides and the like, hairpins curling pins, curling grips, hair curlers and the like, other than those of heading 8516 and parts thereof, vacuum flasks and other vacuum vessels, complete with cases; parts thereof other than glass inners	10%	20%	↑
Household appliances				
8.	Table fans, ceiling fans, pedestal fans, blowers, portable food grinders, other grinders and mixer other appliances, shavers, hair clippers, water heaters and immersion heaters, storage heating radiators, other electrical space heating apparatus, hair dryers, other hair dressing apparatus, hand drying apparatus, electric smoothing irons, other ovens, cookers, cooking plates, boiling rings, grillers and roasters, coffee and tea makers, toasters, electro-thermic fluid heaters, electrical or electronic devices for repelling insects, other electro-thermic appliances used for domestic purposes and electric heating resistors	10%	20%	↑
Machinery				
9.	Railway Carriage fans, Air Circulator, Industrial fans blowers and similar blowers, Other industrial fans, Pressure vessels, Welding and Plasma cutting machines	7.5%	10%	↑
10.	Commercial type combined refrigerator freezers, fitted with separate external doors, commercial freezer of chest type, not exceeding 800 litre capacity, electrical freezers of upright type, not exceeding 800 litre capacity, other freezers of upright type, not exceeding 800 litre capacity, refrigerating or freezing display counters, cabinets, show¬cases and the like, heat pumps other than air conditioning machines, Ice making machinery	7.5%	15%	

Sr. No.	Description	Pre-Budget rate	Post Budget rate	Change
	refrigerating equipment/devices used in leather industry, refrigerated farm tanks, industrial ice cream freezer, others [like freezers of capacity 800 litres and more etc.]			
11.	Other fans with a self-contained electric motor not exceeding 125W	7.5%	20%	
12.	Compressor of Refrigerator and Air conditioner	10%	12.5%	↑
13.	Other chest type freezers, Water cooler, Vending machine, other than automatic	10%	15%	
14.	Rotary tillers/weeder	2.5%	7.5%	↑
15.	Motors like Single Phase AC motors, Stepper motors, Wiper Motors etc.	7.5%	10%	↑
	Electronic goods and parts thereof			
16.	Static Converters	15%	20%	↑
17.	Dip bridge rectifier and Populated, loaded or stuffed printed circuit boards	10%	20%	↑
18.	PCBA of Cellular mobile phones (with effect from April 01, 2020)	10%	20%	↑
19.	Fingerprint readers/scanner, for use in Cellular mobile phones	Nil	15%	↑
20.	Vibrator/Ringer of Cellular mobile phones (with effect from April 1, 2020) and Display Panel and Touch Assembly of Cellular mobile phones (with effect from October 1, 2020)	Nil	10%	↑
21.	Following parts of Microphone for use in manufacture of Microphone namely, a) microphone cartridge b) microphone holder c) microphone grill d) microphone body	10%	Nil	↓
22.	Micro-fuse base, sub-miniature fuse base, Micro-fuse Cover and sub-miniature fuse cover for use in manufacture of micro fuse and sub-miniature fuse	7.5%	Nil	↓
	Automobile and automobile parts			
23.	Catalytic Convertor	10%	15%	↑
24.	Noble metal solutions and noble metal compounds used in manufacture of catalytic converter and their parts	5%	10%	↑

Sr. No.	Description	Pre-Budget rate	Post Budget rate	Change
25.	(a) Parts of catalytic converter for manufacture of catalytic converters. (b) The following goods for use in the manufacture of catalytic converters and its parts, namely: - (i) Raw substrates (ceramics) (ii) Wash coated substrates (ceramics) (iii) Raw substrates (metal) (iv) Wash coated substrates (metal) (v) Stainless steel wire cloth stripe	5%	7.5%	↑
26.	Completely Built Units (CBUs) of commercial vehicles (other than electric vehicles) (with effect from April 1, 2020)	30%	40%	↑
27.	Completely Built Units (CBUs) of commercial electric vehicles (with effect from April 1, 2020)	25%	40%	↑
28.	Semi Knocked Down (SKD) forms of electric passenger vehicles (with effect from April 1,2020)	15%	30%	↑
29.	Semi Knocked Down (SKD) forms of electric vehicles- Bus, Trucks and Two wheelers (with effect from April 1, 2020)	15%	25%	↑
30.	Completely Knocked Down (CKD) forms of electric vehicles - Passenger vehicles, Three wheelers, Two wheelers, Bus and Trucks (with effect from April 1, 2020)	10%	15%	↑
Furniture Goods				
31.	Seats and parts of seats (other than aircraft seats and their parts), Other Furniture and parts thereof, Mattress supports; Articles of bedding and similar furnishing, Lamps and lighting fittings including searchlights and spotlights and parts thereof; Illuminated signs, illuminated name plates and the like, having a permanently fixed light source, and parts thereof (except solar lantern and solar lamps)	20%	25%	↑
Stationary items				
32.	Filing, cabinets, card-index cabinets, paper-trays, paper rests, pen trays, office-stamp stands and similar office or desk equipment, of base metal, other than office furniture of heading 9403, Fittings for loose-leaf binders or files, letter clips, letter corners, paper clips, indexing tags and similar office articles, of base metal; staples in strips (for example, for offices, upholstery, packaging), of base metal, Sign-plates, name-plates, address-plates and similar plates, numbers, letters and other symbols, of base metal, excluding those of heading 9405	10%	20%	↑

Sr. No.	Description	Pre-Budget rate	Post Budget rate	Change
	Paper			
33.	a) Newsprint, if the importer, at the time of import is an establishment registered with the Registrar of Newspapers, India (RNI) b) Uncoated paper used for printing newspaper, if the importer, at the time of import is an establishment registered with the Registrar of Newspapers, India (RNI) c) Lightweight coated paper used for printing magazines, subject to end-use conditions	10%	5%	↓
	Precious Stones and Metals			
34.	Rubies, emeralds, sapphires - unset and imported uncut, Rough coloured gemstones, Rough semi-precious stones, Pre-forms of precious and semi-precious stones, Rough synthetic gemstones and Rough cubic zirconia	Nil	0.5%	↑
35.	Gold used in the manufacture of semiconductor devices or light emitting diodes	Nil	12.5%	↑
36.	Coin	10%	12.5%	↑
37.	Polished Cubic Zirconia	5%	7.5%	↑
38.	Platinum or Palladium used in manufacture of-, a) All goods, including Noble Metal Compounds and Noble Metal Solutions b) Catalyst with precious metal or precious metal compounds as the active substance	12.5%	7.5%	↓
39.	Spent Catalyst/Ash containing precious metal like gold from which such precious metal is retrieved subject to specified conditions	12.5%	11.85%	↓

VI. CHANGES IN EXCISE DUTY

The rates of National Calamity Contingent Duty on tobacco and tobacco products have been increased.

GLOSSARY

ABBREVIATION	MEANING
AAR	Hon'ble Authority for Advance Rulings
ACIT	Learned Assistant Commissioner of Income Tax
AO	Learned Assessing Officer
AY	Assessment Year
BCD	Basic Customs Duty
BEPS	Base Erosion and Profit Shifting
Bill/ Finance Bill	Finance Bill, 2020
CA ,1956	Companies Act, 1956
CA, 2013	Companies Act, 2013
CBDT	Central Board of Direct Taxes
CBEC	Central Board of Excise and Customs
CBIC	Central Board of Indirect Taxes and Customs
CCR	CENVAT Credit Rules, 2004
CEA	Central Excise Act, 1944
CENVAT	Central Value Added Tax
CESTAT	Hon'ble Customs, Excise and Service Tax Appellate Tribunal
CETA	Central Excise Tariff Act, 1985
CIT	Learned Commissioner of Income Tax
CIT(A)	Learned Commissioner of Income Tax (Appeal)
Customs Act	The Customs Act, 1962
DCIT	Learned Deputy Commissioner of Income Tax
DDT	Dividend Distribution Tax
DGCEI	Directorate General of Central Excise Intelligence
DIT	Learned Director Income Tax
DTAA	Double Taxation Avoidance Agreement
FA	The Finance Act, 1994
FTDR Act	Foreign Trade (Development and Regulation) Act, 1992
FY	Financial Year
FM	Finance Minister
GAAR	General Anti Avoidances Rules
GST	The Goods and Service Tax
HC	Hon'ble High Court
HUF	Hindu Undivided Family
INR	Indian Rupees

GLOSSARY

ABBREVIATION	MEANING
IRA	Indian Revenue Authorities
ITC	Input Tax Credit
IT Act	Income Tax Act, 1961
IT Rules	Income Tax Rules, 1962
ITAT	Hon'ble Income Tax Appellate Tribunal
Ltd.	Limited
MAT	Minimum Alternate Tax
MLI	Multilateral Instruments
MSME	Micro, Small & Medium Enterprises
NR	Non-resident
OECD	Organisation for Economic Co-operation and Development
PE	Permanent Establishment
PSU	Public Sector Unit
Pvt.	Private
RBI	Reserve Bank of India
SC	Hon'ble Supreme Court
SCN	Show Cause Notice
SEBI	Securities Exchange Board of India
TDS	Tax Deduction at Source
TCS	Tax Collection at Source
UOI	Union of India
UTGST	Union Territory Goods and Services Tax
UTGST Act	Union Territory Goods and Services Act, 2017
VAT	Value Added Tax

NOTES

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