BOMBAY CHAMBER

MEMORANDUM ON ENACTMENT STAGE CHANGES IN FINANCE BILL 2020 : DIRECT TAXES

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MEMORANDUM ON ENACTMENT STAGE CHANGES IN FINANCE BILL 2020 : DIRECT TAXES
DIRECT TAXATION

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A.		**Personal taxation**
1.	**Clarification with respect to threshold computation for applicability of amended provisions of extended residency rule and deemed residency rule**	➢ **Rationale** ○ The extended residency rule as contained in clause (b) of Explanation 1 to s. 6(1) of the ITA provides that an Indian citizen or a Person of Indian Origin, coming on a visit to India in the relevant previous year and having *"total income, other than income from* foreign sources" exceeding INR 15 lakh (threshold condition) shall be considered as a resident, inter alia, if he is present in India for at least 365 days in the 4 years preceding the relevant previous year and is present in India for 120 days in the relevant previous year. ○ The deemed residency provisions contained in S. 6(1A) of the ITA provide that an Indian citizen, having "total income, other than income from foreign sources" exceeding INR 15 lakh, will be deemed to be a resident in India in the previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature. ○ Further, a new Explanation is added to the provisions of s. 6 which provides that "income from foreign sources" shall mean income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India). ○ There is no further guidance available as regards the computation of the threshold condition. There are certain technical issues which emerge in computation of the threshold condition as enumerated below. ➢ **Issue**: ○ The issue may arise with respect to the computation of "total income". ○ The term "total income" is defined u/s. 2(45) of the ITA as total amount of income referred to in s. 5 and computed in the manner laid down in ITA i.e. the income figure arrived at post application of all the provisions of ITA.

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Thus, an issue arises whether the “total income” required for the purpose of computation of threshold condition is to be understood as per s. 2(45) of ITA or whether in general sense of the term.
Considerable issues may arise if total income is understood as per S. 2(45). For e.g.

The determination of the residential status is followed by computation of the taxable income of the taxpayer. Accordingly, until the residential status of the taxpayer is determined, total income as per s. 2(45) cannot be computed.
Computation of total income under S. 2(45) would entail application of all the provisions of ITA, such as deductions, exemptions, clubbing provisions, transfer pricing, GAAR, treaty implications etc. The legislative intent may not be to complicate the process of mere determination of residential status
There isn’t any necessity to carry out double computation of income – one for determination of residential status and the other for computation of chargeable income under ITA.

On the other hand, S. 2 states that the terms defined therein shall have such meaning under ITA “unless the context otherwise requires...”. Hence, total income term should be given a contextual interpretation and may not always be linked to s. 2(45) of ITA.

Recommendation:

Suitable clarifications be issued to clarify that the term “total income” is to be understood contextually and determined by application of conventional principles, independent of provisions of ITA.
Alternatively, to avoid confusion due to the use of a predefined term of ITA in s. 6, the term “total income” may be substituted with “income” [to be understood in general sense and not as per s. 2(24) of ITA] or “surplus”.

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<tr><td>2.</td><td>Double whammy under S.17(1)(viii) and new</td><td>Rationale
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	S.17(2)(vii)	○ S.17(1)(viii) provides that the employer's contribution to national pension scheme (NPS) shall be taxable as salary income of the employee. However, s. 80CCD(2) grants deduction for such contribution upto 10% of salary [subject to gross total income (GTI) limit]. Hence, to the extent of 10% of salary, employer's contribution to NPS is not effectively taxed in the hands of the employee. ➢ **Amendment by FA 2020** ○ FA 2020 has substituted S.17(2)(vii) to provide that, to the extent employer's contribution to provident fund, NPS and approved superannuation fund in the aggregate exceeds Rs. 7,50,000, the excess shall be taxable in hands of the employee in the year of contribution. ○ Further, a new clause (viia) has been added to s.17(2) to provide that the annual accretion by way of interest, dividend or any other amount of similar nature during the previous year to the balance of the credit of the fund or scheme referred in s.17(2)(vii) to the extent it relates to contributions in excess of Rs. 7.50 lakhs which is taxed u/s. 17(2)(vii) shall also be treated as perquisite and added to taxable income for which the accretion shall be computed in a manner to be prescribed by rules. ➢ **Issue** ○ As per Explanatory Memorandum to Finance Bill 2020, the intent of introducing the amendment is to withdraw undue tax benefit accruing to high salary income earning employees. However, in case of such high salaried individuals, there arises a risk of double taxation of employer's contribution to NPS under S.17(1)(viii) and S.17(2)(vii). ○ Firstly, employer's contribution to NPS is taxable in the hands of employee as "salary" under S.17(1) due to specific provision in clause (viii). Secondly, the definition of "salary" also includes perquisite. Hence, employer's contribution to PF, NPS etc. in excess of the threshold of Rs.7,50,000 u/s 17(2)(vii) is again considered as salary income in hands of the employee. This results in inclusion of same income twice in GTI of the employee. ○ Thereafter, the employee may be able to claim deduction of such employer's contribution to NPS, but, the relief is available only upto 10% of salary income. ○ The aforesaid results in unintended hardship in hands of the high salary earning employees. It also acts as

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		disincentive for the employees to invest in NPS and lowers the retirement corpus of the employees. o Also, it is not clear how the annual accretion in respect of excess contribution over Rs. 7.50 lakhs will be computed since the rules are yet to be prescribed. It may be noted in case of NPS and approved superannuation fund, the accretion is not in the nature of interest like in case of provident fund. The accretion is by way of increase in net asset value of the corpus (like mutual fund units) and it will not be easy to identify the accretion in respect of excess contributions. Further, the net asset value may also go down if the stock market value falls. It is not clear whether the employee will be allowed deduction in case of such fall in value during the year – which is a likely scenario considering the adverse impact of Covid 19 pandemic. If the rules are not prescribed in time, there will be salary TDS shortfall making it difficult for the employer to recover and pay the TDS – more particularly, in cases where the employees have left the organisation ➢ **Recommendation** o It is recommended that the provisions of S.17 should be suitably amended to address the issue of double taxation by amending provisions of S.17(2)(vii) to exclude income taxable under S.17(1)(viii). o Alternatively, the CBDT may issue a circular or notification to address the issue of unintended double taxation. o Further, the rules for computing the annual accretion on excess contributions may be notified at the earliest. The feature of NAV based accretion to NPS and approved superannuation fund and possibility of decline in value in a particular year may be duly considered while framing such rules.
B.	**Issues related to TDS on dividends**	
3.	**Dividend surcharge mismatch for**	➢ **Rationale** o **Background and Issue**

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	different classes of non-resident taxpayers and mismatch with income from mutual funds and units of business trusts	– The amendments at enactment stage to FB 2020 have reduced surcharge rates on dividend for individuals, HUFs, AOP, BOI and AJP to maximum 15% (as compared to highest surcharge of 37%) as per original budget proposal. – The amendments carried out to FB 2020 at enactment stage are at Parts II and Part III of First Schedule to FB 2020 which are linked to 'rates in force' referred in s.2(5) of FB 2020. Thus, wherever the relevant final rate or TDS provision refers to 'rates in force', the maximum surcharge on dividends stands reduced to 15%. – However, many final rate and TDS provisions provide for specific rates of tax on dividend income. They are covered by s.2(6) and s.2(9) of FB 2020. Unfortunately, s.2(6) and s.2(9) of FB 2020 have not been amended at enactment stage to reduce maximum surcharge to 15% for dividend income – This has resulted in mismatch between (a) surcharge on dividends between different classes of non-resident taxpayers and (b) TDS rates and final rates on dividend income for some non-resident taxpayers. This is summarised in Table on the next page. – The most significant impact is on FPIs (assessed in the status of individual or AOP or BOI) who will be liable to higher rate of surcharge on dividend income. – The other class of non-resident taxpayers impacted by higher surcharge are unit holders in REIT/Invits. Incidentally, they also face mismatch between TDS rate (10%) and final rate (20%) as indicated in Table on next page. – It may be recollected that similar issue was encountered when surcharge rate on capital markets transactions were reduced through Taxation Laws Amendment Ordinance promulgated in September 2019 but FPIs assessed in the status of individual or AOP or BOI were left out in view of absence of corresponding amendment. This was subsequently covered up in the Taxations Laws Amendment Act enacted in December 2019. Similar corrective action may be required for lowering of surcharge rate on dividends. ➢ **Recommendation**

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		○ It is suggested that CBDT may clarify whether the mismatches are intentional. If they are unintentional, CBDT may clarify how they shall be addressed through legislative amendments and what rates can be adopted by taxpayers in the intervening period.

➢ **Table summarising dividend surcharge rate mismatch for different classes of non-resident taxpayers.**

Section	**Nature of payment to non-resident**	**TDS rate prescribed (rates in force or specified rate)**	**Whether covered by s.2(5) r.w Part II of First Schedule or s.2(6) of Finance Bill 2020?**	**Whether TDS at higher or lower surcharge?**	**Whether final tax liability for advance tax purposes at higher or lower surcharge?**
194LBA	Dividend income from business trust	Rate specified - section 194LBA(2) – 10%	s. 2(6) of Finance Bill, 2020	Higher surcharge	Higher surcharge Rate – 20% S.115A(1)(a)(i)r.w. clause (a) of third proviso to s.2(9) of Finance Bill 2020
194LBB	Dividend income from Alternative Investment Fund	Rates in force - section 194LBB(ii)	s. 2(5) of Finance Bill, 2020	Lower surcharge	Higher surcharge S.115A(1)(a)(i)r.w. clause (a) of third proviso to s.2(9) of Finance Bill 2020
194LBC	Dividend income from Securitisation Trust (Practically possibility of	Rates in force - section 194LBC(2)	s. 2(5) of Finance Bill, 2020	Lower surcharge	Higher surcharge S.115A(1)(a)(i)r.w. clause (a) of third proviso to s.2(9) of Finance Bill 2020

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		(table continued below)
4.	**Dividend vs. mutual fund income & income from units of business trusts**	➢ **Background and Issue** ○ While maximum surcharge on dividend income is reduced to 15%, there is no corresponding reduction in surcharge for income from mutual fund units and units of business trusts (REIT/Invits). This creates mismatch between different classes of capital market equity instruments.

	dividend from securitisation trust is less likely but cannot be completely ruled out)				
195	Dividend income	Rates in force	s. 2(5) of Finance Bill, 2020	Lower surcharge	Higher surcharge S.115A(1)(a)(i)r.w. clause (a) of third proviso to s.2(9) of Finance Bill 2020
196D	Dividend income paid to FPI	Rate specified - section 196D – 20%	s. 2(6) of Finance Bill, 2020	Higher surcharge	Higher surcharge S.115AD(1)(a) r.w. clause (aa) of third proviso to s.2(9) of Finance Bill 2020 although lower surcharge is provided for capital gains incomes from securities

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	(ReITs/InvITs)	o It may be noted that the capital gains income from equity oriented mutual funds and units of business trust are subjected to lower surcharge upto 15%. Similarly, there should be parity between surcharge on dividend income and income from mutual fund units/units of business trust. ➢ **Recommendation** o Income from mutual funds and business trusts may be put at par with dividend income by restricting maximum surcharge to 15%.
5.	**Clarify person whose PAN should be considered in case of dividend payment on GDRs**	➢ **Background and Issue** o The TDS rate on dividend payment on GDR is 10% u/s. 196C. Following extracts from the erstwhile Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993 made it clear that dividend paying company can rely on PAN of overseas depository for making TDS compliance in India *"Taxation on shares issued under Global Depositary Receipt Mechanism.* *9. (1) Under the provisions of the Income-tax Act, income by way of dividend on shares will be taxed at the rate of 10 per cent. The issuing company shall transfer the dividend payments net after deduct tax at source to the Overseas Depositary Bank.* *(2) On receipt of these payments of dividend after taxation, the Overseas Depositary Bank shall distribute them to the non-resident investors proportionate to their holdings of Global Depositary Receipts evidencing the relevant shares. The holders of the Depositary Receipts may take credit of the tax deducted at source on the basis of the certification by the Overseas Depositary Bank, if permitted by the country of their residence."* o Similar provision is not present in extant Depository Receipts Scheme, 2014. The issue was not relevant earlier since dividend was exempt u/s. 10(34). But now since dividend income is taxable in hands of shareholder, issue will arise in whose PAN is the dividend paying company supposed to do TDS compliance in India such that provisions of s.206AA requiring higher TDS @ 20% are not triggered ➢ **Recommendation**

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<tr><td></td><td></td><td>o It may be clarified through a Circular or through express amendment in s.206AA or s.196C, that TDS compliance on dividend payment on GDRs will need to be made under PAN of overseas depository</td></tr>
<tr><td>C.</td><td colspan="2">TDS and TCS provisions</td></tr>
<tr><td>6.</td><td>Exempt SPVs from carrying out withholding obligation u/s. 194 on distribution of dividend to business trust</td><td>➢ Rationale
o Post withdrawal of s. 115-O(7) of ITA, company is no more required to discharge DDT. Consequently, dividend income received by a shareholder is taxable in the hands of shareholders.
o Business Trust (ReIT/InvIT) receives dividend income from its investment in SPVs. Such dividend income is not taxable in the hands of business trust in view exemption to the business trust u/s. 10(23FC)(b) of ITA. Under the pass through system of taxation and based on amendment to s.10(23FD) at enactment stage of FB 2020, the dividend so distributed by the Business Trust is either taxable in the hands of unitholders (if SPV has opted for lower tax regime u/s. 115BAA) or exempt in the hands of unitholders (if SPV has not opted for lower tax regime u/s. 115BAA). Further, SEBI regulations mandate Business Trust to distribute 90% of its incomes received to its unitholders in the same year.
o S. 194 of ITA imposes obligation on domestic company to withhold taxes on distribution / payment of dividend income at the rate of 10% before making payment by any mode. This section was not amended by FA 2020 to carve out exemption for dividend paid by SPV to Business Trust.
➢ Issue
o S. 194 of ITA does not provide any exception from withholding when SPV makes payment of dividend to business trust. In absence of any exception, even when the dividend income received by business trust from SPVs is exempt, SPV will require to withhold taxes. This will lead to cash trap for Business Trust and deferred distribution of dividend income to unit holders.
o To avoid such cash trap, Business Trust will need to administratively obtain NIL TDS certificate every year u/s. 197 which increases compliance burden on the Business Trust. It is practically not feasible for Business Trust to give declaration as per Rule 37BA(2) to SPV to deduct tax directly in the name of unit holders for the reason</td></tr>
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		that the composition of unit holders may change between the record date for paying dividend and actual distribution by Business Trust since the units are freely transferable (more particularly in case of listed ReITs/InvITs) o In case of distribution of income to Securitisation Trusts and Alternative Investment Funds which are also investment pooling vehicles like Business Trust, the CBDT has issued notifications u/s. 197A(1F) which exempt the payers from deducting tax on incomes distributed to such vehicles on which the vehicles themselves are not liable to tax. ➢ **Recommendation** o Suitable amendment in s. 194 of ITA may be made to provide carve out when the SPV distributes the dividend income to business trust. o A notification may be issued u/s. 197A(1F) of ITA to provide exemption to SPV from withholding on dividend income paid by SPV to business trust. The Notification may be on similar lines of Notification No. 51/2015 dated 25 June 2015 or Notification No. SO 2142(E) dated 17 June 2016 in the context of person making payment to Alternative Investment Fund and Securitisation Trust of incomes which are exempt in the hands of Alternate Investment Fund or Securitisation Trust.
7.	**Reduce TDS rate on fees for professional services to 2% or provide guidance on classification between 'Fees for technical services' liable to TDS @ 2% and 'Fees for**	➢ **Rationale** o The FA 2020 has reduced the TDS rate u/s 194J to 2% (from existing 10%) in case of FTS payments but retained TDS rate at 10% for fees for professional services. o The Explanatory Memorandum clarifies that the amendment is proposed since there are large number of litigations on the issue of short deduction arising out of characterisation dispute between s. 194C and s 194J. o While provision of 2% rate for FTS payments is a welcome change, the proposed amendment will give rise to a new litigation in the form of distinction between professional services and technical service. Thus, such selective amendment for providing lower rate only for FTS payments is in direct conflict with the rationale in the Explanatory Memorandum that it is intended to avoid litigation on short deduction issues.

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	professional services' liable to TDS @ 10%	○ There is significant overlap between scope of FTS which covers managerial, technical or consultancy services and fees for professional services which, inter alia, includes profession of technical consultancy, engineering services, information technology, etc. Hence, disputes will arise whether payments for such services will be liable for TDS @ 2% or TDS @ 10%. ➢ **Recommendation** ○ Hence, it is recommended that TDS rate on professional services should also be reduced to 2% to avoid characterization disputes between fees for technical services and fees for professional services. ○ Alternatively, CBDT should issue proper guidance with illustrations for uniform implementation of revised TDS rates by the payers and avoidance of characterization disputes. ○ As a broader measure to simplify TDS compliance, the disparity in TDS rates for payments to residents under different provisions like s.194, 194A, 194C, 194H, 194J, etc should be eliminated and a uniform TDS rate should be provided for all payments to residents to avoid characterization disputes.
8.	**Tightening of TDS provisions on cash withdrawals u/s. 194N**	➢ **Rationale** ○ Finance (No. 2) Act, 2019 inserted S. 194N in ITA providing for withholding of tax by a bank (including a co-operative bank) or a post-office, where the aggregate withdrawals in cash in a year exceeds INR 1 Crore. Such deduction is to be carried out at 2% on the amount of withdrawal in cash exceeding INR 1 Crore. ○ S. 194N, as inserted, read as follows: *Every person, being,—* *(a) banking company to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act);* *(b) a co-operative society engaged in carrying on the business of banking; or* *(c) a post office,* *who is responsible for paying any sum, or, as the case may be, aggregate of sums, in cash, in excess of one*

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		crore rupees during the previous year, to any person (herein referred to as the recipient) from one or more accounts maintained by the recipient with it shall, at the time of payment of such sum, deducts an amount equal to two per cent of ***<u>sum exceeding one crore rupees</u>****, as income-tax"* ➢ **Amendment by FA 2020** o FA 2020 substitutes the existing S. 194N with a revised provision. The newly inserted S. 194N now reads as follows: *"194N. Every person, being,—* *(d) a banking company to which the Banking Regulation Act, 1949 applies (including any bank or banking institution referred to in section 51 of that Act);* *(e) a co-operative society engaged in carrying on the business of banking; or* *(f) a post office,* *who is responsible for paying any sum, being the amount or the aggregate of amounts, as the case may be, in cash exceeding one crore rupees during the previous year, to any person (herein referred to as the recipient) from one or more accounts maintained by the recipient with it shall, at the time of payment of* ***<u>such</u>*** *sum, deduct an amount equal to two per cent of* ***<u>such</u>*** *sum, as income-tax:"* o In addition, a new first proviso has been inserted to provide a lower threshold of cash withdrawals in case of specified Taxpayers. The first proviso reads as follows: *Provided that in case of a recipient who has not filed the returns of income for all of the three assessment years relevant to the* ***<u>three previous years, for which the time limit of file return of income under sub-section (1) of section 139 has expired, immediately preceding the previous year in which the payment of the sum is made to him,</u>*** *the provision of this section* *shall apply with the modification that—* *(i) the sum shall be the amount or the aggregate of amounts, as the case may be, in cash exceeding twenty*

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		lakh rupees during the previous year; and *(ii) the deduction shall be—* • *an amount equal to two per cent. of the sum where the amount or aggregate of amounts, as the case may be, being paid in cash exceeds twenty lakh rupees during the previous year but does not exceed one crore rupees; or* • *an amount equal to five per cent. of the sum where the amount or aggregate of amounts, as the case may be, being paid in cash exceeds one crore rupees during the previous year.* ➢ **Issue** ○ **Withholding whether applicable on entire withdrawal or only on withdrawal exceeding INR 1 Crore in case of non-specified Taxpayers** – The newly substituted S. 194N is ambiguously worded. The phrase *"sum exceeding one crore rupees"* which existed in the erstwhile provision has been deleted and hence it gives rise to an ambiguity of whether deduction of tax needs to be made only on the sum exceeding INR 1 Crore or on the entire amount of withdrawal inclusive of INR 1 Crore. – The intent of the amendment does not appear to be to change the existing provisions but merely to provide a lower threshold for specified Taxpayers. In fact, in case of cash withdrawals by specified Taxpayers, the first proviso clearly indicates that the withholding would apply only on withdrawals exceeding INR 20 lakhs. ○ **The determination of three years for which the return filing compliance needs to be checked for applicability of the lower threshold prescribed in first proviso** – Further, the newly introduced first proviso can result in more than one interpretation on which of the three years are to be considered for the purpose of determining the applicability of the lower threshold. The two possible interpretations of the first proviso are as follows: • View 1: Three years refer to the three financial years (FY) immediately preceding the year for

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		which the due date for filing return of income u/s 139(1) has already expired as on the first day of year in which cash withdrawal is made. For e.g.: For cash withdrawals in the year FY 2021-22, the three years in which the compliance of return filing is to be checked for would be FY 2017-18, 2018-19 and 2019-20 (i.e. AY 2018-19, AY 2019-20 and 2020-21). • View 2: Three years refer to the three financial years immediately preceding the year for which the due date for filing ROI has expired as on the date of cash withdrawal. Since the applicability of lower threshold depends on filing of return of income in such three years, withholding in FY 2021-22 would be a rolling period. For instance, consider a case where the person who is withdrawing cash is an individual. In the case of an individual, the return filing due date u/s 139(1) falls on 31 July 2021. Thus, for withdrawals till 31 July 2021, the three years would be FY 2017-18, 2018-19 and 2019-20 (i.e. AY 2018-19, AY 2019-20 and AY 2020-21). Subsequent to 31 July 2021, the three years would be FY 2018-19, 2019-20 and 2020-21 (i.e. AY 2019-20, 2020-21 and 2021-22). ➢ **Recommendation** ○ It is recommended that either the language of S. 194N is replaced with the erstwhile language or a circular be issued to clarify that the withholding would apply only in respect of withdrawals exceeding Rs 1 Crore in case of non-specified Taxpayers. ○ It may be clarified that View 1 as described above i.e. a fixed period of three financial years for which the return filing due date u/s 139(1) has expired prior to commencement of the relevant financial year in which cash is withdrawn, is to be considered for the purpose of determination of applicability of the lower threshold under the first proviso. This will provide ease of compliance and certainty for the banks for applying the lower threshold throughout the financial year and avoid complications of position of applicability of first proviso changing in the middle of the year.
9.	**Eliminate S.194-O(6) which deems e-commerce**	➢ **Rationale:** ○ S.194-O of ITA, as introduced by FB 2020, defined “e-commerce operator” as “a person who owns, operates or manages a digital platform and is responsible for paying to e-commerce participant” which indicated that one of the conditions to qualify as “e-commerce operator” was the contractual obligation of such e-commerce

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	operator as person responsible for paying to e-commerce participant	operator to pay to e-commerce participant. ○ However, at enactment stage, such definition was amended to exclude the condition of contractual requirement of paying sum to e-commerce participant. Further, S.194-O(6) was introduced wherein the e-commerce operator is deemed as person responsible for paying to the e-commerce participant. Thus, as per the amended provision, irrespective of contractual obligation of payment, e-commerce operator is required to deduct TDS u/s.194-O. ○ On similar lines, Explanation to S.194-O(1) provides for trigger of TDS liability on e-commerce operator even where payments are directly made by customers to e-commerce participant. ➢ **Issue** ○ E-commerce operators may face difficulties to comply with the provisions where customers make payments directly to e-commerce participant or through some other party and the money does not flow through e-commerce operator. ○ Furthermore, the recent RBI Guidelines dated 17 March 2020 applicable to payment aggregators and payment gateways require e-commerce marketplaces to disintegrate their business of sale of goods or service and business of collection and payment intermediary between merchants and customers. The Guidelines require the payment aggregators to deposit money in a separate escrow account wherein restrictive list of debits and credits are allowed and such list does not permit deduction of TDS from amount payable to e-commerce participants. ○ Such RBI restrictions and absence of cashflow creates difficulty in undertaking TDS compliance u/s.194-O and e-commerce operator will face hardship in collection of TDS from vendors ○ Even under CGST Act, 2017, e-commerce operator is required to collect TCS on goods or services sold through its platform provided that the e-commerce operator collects consideration for goods or services. ➢ **Recommendations** ○ It is recommended that the provisions creating deeming fiction for responsibility of payment should be

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		withdrawn and TDS obligation should be imposed on e-commerce operator only if the e-commerce operator is contractually responsible for paying.
10.	**Certain issues w.r.t implementation of s. 194-O which can be addressed by CBDT Guidelines**	At the enactment stage, FA 2020 has introduced S.194-O(4) and (5) which empowers CBDT to issue binding guidelines in relation to S.194-O. While this is a welcome move, it is recommended that the CBDT should follow consultative approach for issuing guidelines (similar approach was adopted for issue of POEM Guidelines, Notification u/s.115JH, Rule 11UA). It is recommended that in order to ease implementation of S.194-O, CBDT should issue, inter-alia, the following clarifications: ➢ **Clarify that amount liable for TDS under S. 194-O is net amount of sales and not gross sales receipts** ○ **Amendment by FA 2020** – S.194-O(1) provides that the e-commerce operator shall be required to deduct tax at source on credit or payment made to e-commerce participants. The tax is to be withheld on "gross amount of such sales or services or both". ○ **Issue** – In marketplace models and e-commerce industry, the "gross" amount of sale price of goods or services is not always recovered from the customer. It is common for marketplace to provide features of discount, guaranteed returns etc. The actual sale price after allowing discount is significantly lower than the gross value of sale of goods or services. Further, there is usually a 15 day window period for the buyers to return goods purchased through its platform. In such case, use of the term "gross" may result in difficulty for undertaking TDS compliance as the e-commerce operator becomes liable to pay tax on gross amount of sale price rather than the actual sale price. – Even under GST law, TCS at the rate of 1% is collected by e-commerce operator on net taxable value of supplies which excludes sales return. ○ **Recommendation** – In order to avoid ambiguity and cascading effect, it is recommended that the CBDT Guidelines should explicitly clarify that the gross amount of sale of goods or services for S.194-O should be computed

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		after deducting discounts, sales return etc. ➢ **Clarify that TDS is not to be withheld on the GST/ indirect tax portion** ○ **Amendment by FA 2020** – S.194-O(1) provides that the e-commerce operator shall be required to deduct tax at source on credit or payment made to e-commerce participants. The tax is to be withheld on "gross amount of such sales or services or both". ○ **Issue** – Further, under GST provisions, e-commerce operators charge and collect GST along with base sale price of goods or services. The use "gross amount" implies that the e-commerce operator is required to collect TDS even on the value of GST charged on goods or services. – However, the CBDT has time and again clarified vide various circulars that TDS is not required to be deducted on service tax or GST component where the agreement/ contract or invoice specifies the amount of indirect taxes separately. ○ **Recommendation** – Similar to clarifications issued under other TDS provisions, it should be clarified that e-commerce operator is not required to withhold tax on the amount of GST/ indirect tax that is collected from the customer. ➢ **Exclude shares, securities, actionable claims, money, etc. from the scope of "goods" and "services"** ○ **Amendment by FA 2020** – The definition of electronic commerce under clause (a) of Explanation to S.194-O is provided to mean supply of goods or services or both, including digital products, over digital or electronic network. ○ **Issue** – The definition of "electronic commerce", "e-commerce operator" under S. 194-O seems wide enough

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		to cover conventional and well-regulated platforms/ markets such as stock exchange or power exchange. Considering the intent of S. 194-O is to tax e-commerce transactions and tax evaders, if any; it may not be correct to levy such obligation on stock exchange or power exchange which are conventional and well-regulated sectors. – Further, there is ambiguity on whether sale of actionable claims like gift cards are covered within the scope of S. 194-O. – It is also not clear whether the definition of “goods” needs to be interpreted as per the Sale of Goods Act or the GST Act or some other legislation. For instance, whether the term “goods” includes shares, securities, money/ foreign currency, electricity etc. within its scope is not clear since there are different inclusions and exclusions within scope of ‘goods’ under various laws. – For instance, under GST law, items like share, securities, money, actionable claims are specifically excluded from definition of goods but under the Sale of Goods Act, goods include stock and shares. ○ **Recommendation** – It is recommended to introduce suitable clarification in the CBDT Guidelines to exclude certain terms like shares, securities, power units, money, actionable claims from scope of “goods” under provisions of S. 194-O. ➢ **Clarification on person liable to withhold tax where multiple e-commerce operators are involved in the transaction chain** ○ **Amendment by FA 2020** – S. 194-O requires an e-commerce operator to withhold taxes on transaction of sale or service that is facilitated by such e-commerce operator. ○ **Issue** – The digital business models are highly integrated with multiple e-commerce operators being involved in the transaction chain.

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		– For instance, consider business models where there is one e-commerce operator (ACo) which merely lists the products of various other online sellers/ e-commerce operators (say BCo). In such case, where customer gets search results on ACo's platform and wants to buy a particular product, he will be redirected to BCo's platform. The customer can buy the product only on BCo's platform. – In such case, there is a concern whether both ACo and BCo will be liable to withhold tax under S. 194-O specially since this may create duplicated levy of TDS on the same transaction. It also creates misperception on person who is actually liable to deduct TDS. ○ **Recommendations** – It is recommended that CBDT Guidelines should clarify that the e-commerce operator which enters into contract for sale or service with e-commerce participant and has privity with the e-commerce participant for such transaction shall be covered u/s.194-O. Similar provisions are also present under GST law which required e-commerce operator to collect TCS. ➢ **Exclusion of payment aggregator or payment gateways (covered under RBI Guidelines 2020 dated 17 March 2020) from S.194-O:** ○ **Amendment by FA 2020** – S. 194-O requires an e-commerce operator to withhold taxes on transaction of sale or service that is facilitated by such e-commerce operator. ○ **Issue** – The broad scope of S. 194-O may also cover payment aggregators or payment gateways which act as intermediary by facilitating collection and settlement of payments between customers and e-commerce participants. As aforesaid, the RBI Guidelines also require that the payment function should be undertaken through a separate entity as against the marketplace function. This will further reduce the visibility of payment systems over the transaction. The payment entities merely assist in completion of payment arm of the transaction and are not involved in selling of goods or services.

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		○ **Recommendation** – It is recommended that the CBDT Guideline should specifically clarify that the payment aggregators and payment gateways which are governed by RBI Guidelines are not covered under S.194-O. ➢ **In case of sales by consignment agent on behalf of principal, it may be clarified that obligation to collect TCS shall be on Principal** ○ **Amendment by FA 2020** – S. 206C(1H) requires every person being seller to collect TCS from the buyer of goods on receipt of sale consideration exceeding in aggregate Rs. 50L in any previous year. The section excludes particular class of persons from the scope of buyer and seller ○ **Issue** – The provision of s. 206C(1H) provides that every person being a seller shall collect TCS from the buyer. In case of sales by consignment agent on behalf of principal, question may arise whether TCS obligation is on the principal (who is the legal seller) or the agent who receives sales consideration from the buyer ○ **Recommendation** – It may be clarified that the legal obligation to collect TCS is on Principal and not on the agent undertaking sales activity on behalf of Principal. Hence the primary obligation to comply with TCS is on the principal being the legal seller of goods – But since, practically, the sales consideration is first received by the agent, it may also be clarified that where agent collects TCS from the buyer and deposits with Government using his own TAN and issues TCS certificate to the buyer, there shall be no adverse consequences for principal for non-collection of TCS – Further, it may also be clarified that credit of TCS to the buyer would be available in all cases even in

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		case where the TCS is collected by agent and not the principal on whose behalf sales are undertaken ➢ **Clarify that if TDS is made by e-commerce operator u/s. 194-O, no TCS is required by seller (e-commerce participant) of goods** ○ **Amendment by FA 2020** − Second proviso to s.206C(1H) provides that TCS on sale of goods will not apply, if the buyer is liable to deduct tax at source under any other provisions of this Act on the goods purchased by him from the seller and has deducted such amount. ○ **Issue** − In e-commerce transactions, it is proposed to cast responsibility of TDS on e-commerce operator and buyer is relieved from any TDS obligation. (Refer, s.194-O(3)). However, on a conjoint reading of both provisions, it is not clear whether the seller/e-commerce participant (seller) is relieved from TCS obligation if e-commerce operator has deducted tax u/s. 194-O. This is because e-commerce operator is not the 'buyer' in the e-commerce transaction. He merely 'facilitates' the sale between e-commerce participant (seller) and the buyer. This can potentially lead to same transaction being subject to TCS by the seller and TDS by the e-commerce operator. ○ **Recommendation** − It may be clarified that where e-commerce transaction is subject to TDS u/s. 194-O by e-commerce operator, TCS on sale of goods shall not apply to the e-commerce participant/seller. **Defer date of applicability of new TDS provision to 1 April 2021** ○ The outbreak of Novel Corona Virus (COVID-19) across many countries of the world has caused immense loss to the lives of people, and accordingly, it has been termed as pandemic by the World Health Organisation and various Governments including Government of India. The COVID-19 pandemic has caused disruptions across the world, including India. This has resulted in a rapidly slowing economy, which some believe is showing

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		recessionary trends. Social distancing has been unequivocally accepted to be the best way to contain its spread, leading to announcement of complete lockdown in the country and difficulty faced by the taxpayers in complying with statutory and regulatory requirements. o Rightfully acknowledging such challenging time and difficulties faced by the taxpayers, the Finance Minister of India, Nirmala Sitharaman, announced certain measures on 24 March 2020 to ease the statutory and compliance burden. The relaxation measures included extension of various due dates from 31 March 2020 to 30 June 2020 including due date of filing belated and revised tax returns for tax year 2018 -2019, specified date under “The Direct Tax Vivad Se Vishwas Act, 2020”. o The effective date of new TDS u/s. 194-O has also been deferred till 1 October 2020 at enactment stage of Finance Bill 2020. o But e-commerce industry will require longer time to implement the new TDS requirement considering the disruption caused by Covid-19 pandemic and hence it is recommended that the effective date of the new TDS provision u/s. 194-O may be further deferred till 1 April 2021.
11.	**Carve out B2B transactions from the ambit of TCS provision u/s. 206C(1H) as it will lead to multiple level of tax collection**	➢ **Rationale** o In order to widen and deepen the tax net, FA 2020 extended the TCS provisions to cover a seller of “goods” other than the goods exported outside India or goods specified u/s. 206C(1)/ (1F)/ (1G) of ITA such as alcohol, motor vehicles, forest produce, scrap etc. The provision applicable w.e.f 1 October 2020. o TCS provisions would apply only to a seller whose sales, turnover or gross receipts in the business carried on by him exceeds INR 10 Crores during the immediately preceding financial year, and who receives, in any previous year, any amount as consideration for sale of goods aggregating to INR 50 lakh or more, from a single buyer. o Further, the definition of ‘buyer’ excludes from its scope Central Government, State Government, various other authorities, person importing goods into India and also empowers the Central Government to notify

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		class of persons for further exclusion. ➢ **Issue** o The provisions of TCS for sale of goods u/s. 206C(1H) do not specifically make distinction between sales made to the intermediate customers (B2B transactions) and sales made to the final customers (B2C transactions). o In absence of specific exclusion for B2B transactions, the provision appears to apply for all types of sale transactions, irrespective of whether the transaction involves sales to intermediate entities/ customers or it is sale to final customers. o Applicability of TCS provisions to B2B transactions as well may result in tax being collected at multiple levels, in turn, may lead to cash blockage at entity level. In a supply chain structure consisting of manifold entities (as is usually prevalent in the retail sector), this would result in tax being collected multiple times on the same transaction. Collection of tax at multiple entity levels increases the administrative compliance burden, transaction costs and results in cash flow trap Since B2B transactions are made with multiple vendors, it is administratively burdensome to apply for lower/ NIL TCS for all vendors. Further, benefit of lower/ Nil TCS has not been extended to s. 206C(1H) by FA 2020. o Further, such transactions being subject to GST, there is already an audit trail available with the GST Department which can be easily leveraged by the Income tax Department through electronic sharing of data on automated basis and making use of Artificial Intelligence to mine the data to detect tax evasion. TCS on sales results in multiple levy of tax on same transaction. ➢ **Recommendation** o Given the administrative inconvenience the provision is likely to cause due to tax collection at multiple entity levels, it is recommended to provide exclusion for sellers from collection of tax under section 206C(1H) selling goods to intermediate persons/ dealers (B2B transactions). o It may be noted that in the context of TCS on motor vehicles, CBDT provided clarification vide Circular No.22/ 2016 dated 8 June 2016 that TCS u/s. 206C(1F) on motor vehicles of value more than INR 10 lakhs does not apply to sale of motor vehicles by manufacturers to dealers/ distributors since the intent of the provision was

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		to bring high value transaction within tax net to cover transactions of retail sales. Carve out may be provided for sale of goods covered under section 206C(1H) for B2B transactions on similar lines as in case of sale of motor vehicles.
12.	**Clarify the scope of the term "goods" used in s. 206C(1H) i.e. TCS on sale of goods**	➢ **Rationale** ○ FA 2020 extended the TCS provisions to cover a seller of "goods" other than the goods exported outside India or goods specified u/s. 206C(1)/ (1F)/ (1G) of ITA such as alcohol, motor vehicles, forest produce, scrap etc. ➢ **Issue** ○ S. 206C(1H) triggers TCS on sale of all goods except goods which are being exported outside India or goods covered by other TCS provisions of s. 206C(1)/ (1F)/ (1G) such as tendu leaves, alcohol, motor vehicles etc. ○ The term "goods" covered by s. 206C(1H) is not defined in the ITA which creates ambiguity on scope of the said TCS provision. It is also not clear whether the definition of goods needs to be interpreted as per the Sale of Goods Act 1930 (SOGA) or the Central Goods and Services Tax Act 2017 (CGST Act) or some other legislation. For instance, whether the term "goods" includes shares, securities, money/ foreign currency, electricity etc. within its scope is not clear since there are different inclusions and exclusions within scope of 'goods' under various laws. For instance, definition of goods under SOGA includes stock and shares but definition of goods under CGST Act excludes securities. ➢ **Recommendation** ○ It is therefore recommended that the term "goods" should be defined clearly in the ITA for the purpose of TCS u/s. 206C(1H) and it should specifically exclude items such as shares, securities, money/ foreign currency, power, etc. from its scope.
13.	**Clarify whether TCS obligation**	➢ **Rationale** ○ FA 2020 introduced u/s. 206C(1H) of ITA to cover sale of "goods" under the ambit of TCS provisions. It is

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	u/s 206C(1H) triggers on actual receipt of sales consideration, irrespective of mercantile method of accounting followed by the seller	provided that the tax is to be collected by the seller @ 0.1% (1% in absence of PAN/ Aadhaar) at the time of "receipt" of sales consideration exceeding INR 50 lakhs. ➢ **Issue** ○ TCS obligation u/s. 206C(1H) on sale of goods triggers at the time of "receipt" of amount as consideration for sale of goods exceeding INR 50 lakhs in any previous year. ○ Unlike s. 206C(1H), TCS obligation u/s 206C(1G) in relation to Liberalised Remittance Scheme and overseas tour program package triggers at the time of debiting the amount payable by the buyer or at the time of receipt of such amount from the said buyer, by any mode, whichever is earlier. ○ Both the sub-sections are introduced by the same Finance Act with effect from 1 October 2020. ○ Thus, the Legislature seems to have made a conscious departure in the trigger point for TCS collection u/s 206C(1H) at the time of receipt of amount towards sales consideration. In this regard, as per the plain reading of the provision, it appears that TCS needs to be collected strictly on actual receipt basis, irrespective of the method of accounting followed by the seller. Thus, TCS is to be collected on receipt of each amount towards sales consideration, whether received in advance or after completion of the sale by way of deferred payment. ○ If such is the correct reading, since the provision applies with effect from 1 October 2020, it can be inferred that TCS needs to be collected on all amounts received by the seller on or after 1 October 2020, irrespective of the fact whether the sale has been concluded prior to or post 1 October 2020. As a corollary, no TCS needs to be collected on amounts received upto 30 September 2020 even if sale is concluded on or after 1 October 2020. Further, no TCS is required on sales consideration written off as irrecoverable bad debts in books. ○ The same interpretation applies in all the years, and not restricted merely to transitional year. For instance, if the sale is concluded in May, but consideration is received in August, TCS needs to be collected by the seller in August. ○ If it is correct to state that TCS obligation u/s 206C(1H) triggers strictly on actual receipt basis, it will lead to mismatch between books of accounts of the sellers following mercantile method of accounting and TCS obligation. While it is true that casting TCS obligation at the time of receipt of sales consideration is beneficial

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		to the seller from cash flow perspective since he is required to discharge TCS only on actual receipt, but practically reconciling the sales as per GST and financial reporting recognised on mercantile method of accounting and actual sales realisations for TCS purposes may lead to litigation and disputes. ➢ **Recommendation** ○ In light of above referred considerations, it may be clarified by the CBDT whether the TCS obligation on sale of goods u/s 206C(1H) triggers strictly on actual receipt basis or receipt needs to be understood as per the method of accounting followed by the seller.
14.	**Benefit of lower TCS rate should also be extended to remittances for medical treatment similar to benefit granted for remittances out of education loan**	➢ **Rationale** ○ As per the amendment by FA 2020 to s. 206C(1G)(a), Authorised Dealer (AD) is not required to collect TCS where the amount or aggregate amount of remittances outside India under LRS, other than for purchase of overseas tour package, is less than INR 7 lakh in a FY. Further, TCS is required to be collected at the rate of 5% on the amount which is in excess of INR 7 lakh. ○ However, in case where the remittance is out of the loan obtained from any financial institution (as defined in s. 80E of ITA) for the purpose of pursuing any education, AD is liable to collect TCS at the rate of 0.5% (instead of 5%) on the amount or aggregate of the amounts in excess of INR 7 lakh remitted by the buyer in a financial year. This beneficial provision was introduced during the enactment stage of FB 2020. ➢ **Issue** ○ Amendment providing for lower rate of TCS @ 0.5% on remittances out of education loan availed from a qualifying financial institution is a welcome move by the Government. ○ However, considering the importance of education and medical sectors, it is not clear why similar benefit is not extended to remittances made for medical expenses/ assistance, subject to suitable safeguards as the Government may impose. ○ In many cases, remittances are made to foreign hospital for advanced medical treatment. Just as in case of foreign education, the remittance is made for genuine purpose. Imposing TCS at high rate of 5% results in cash

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		trap for the remitter at a time he is facing distress due to medical emergency. In fact, it is a better case for lower TCS on unplanned expenditure than foreign education which is a planned expenditure. ➢ **Recommendation** ○ Considering the importance of education and medical sectors, it is recommended that the TCS provisions should not apply in case of remittances made outside India under LRS for study/ education abroad or for availing medical treatment or incurring medical expenses abroad, with suitable safeguards as the Government may deem fit. ○ Alternatively, akin to lower rate of TCS for remittances out of education loan, benefit of lower TCS rate @ 0.5% should also be extended for remittances made in relation to medical expenses/ relief.
15.	**Relaxation of provisions for assessee-in-default to be also extended to sub-sections (1F)/(1G)/(1H) of s. 206C**	➢ **Rationale** ○ S. 206C(6A) provides that if the person responsible for collecting tax (say, seller) does not collect whole or part of the tax amount or fails to pay after collecting, he shall be deemed to be an assessee-in-default. ○ The proviso to s. 206C(6A) provides that such person/ seller responsible for collecting tax u/s 206C shall not be deemed to be assessee-in-default if the buyer has: − Furnished his return of income u/s 139(1) − Taken into such amount (on which TCS was collectible) for computing income in his return of income, and − Paid tax due on income declared by him in the return of income ➢ **Amendment by FA 2020** ○ FA 2020 has restricted the benefit of the above proviso only to sub-section (1) and (1C) of s. 206C. In other words, the relaxation has not been extended to expanded scope of TCS such as sub-section (1F)/(1G)/(1H) of section 206C in relation to sale of motor cars, LRS, overseas tour program package and sale of goods. ➢ **Issue**

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		○ The underlying rationale of proviso to s. 206C(6A) is statutory recognition of legal position clarified by CBDT vide its Circular No. 275 dated 29 Jan 1997 upheld by Supreme Court in the case of Hindustan Coca Cola Beverages (P) Ltd v. CIT (293 ITR 226) and Ely Lilly & Co(I) Pvt. Ltd (312 ITR 225) viz. once the payee/ buyer has paid tax and filed return, the purpose of TDS/ TCS of ensuring tax collection is achieved and hence, the payer/ seller should no more be considered as an assessee-in-default. Hence, the rationale of not extending the relaxation granted by the proviso to other sub-sections is not clear. ○ In case where the buyer has already done the compliance as stated in the proviso to s. 206C(6A), not extending the benefit to the sellers/ persons responsible for collecting tax u/s 206C(1F)/ (1G)/ (1H) will lead to double whammy and create unnecessary administrative and tax compliances for the seller/ buyer. ➢ **Recommendation** ○ Accordingly, it is recommended that the relaxation provided by the proviso to s. 206C(6A) may be extended to the other provisions of TCS such as sub-section (1F)/(1G)/(1H) of section 206C also, since once the buyer has already done the necessary compliance, not extending the benefit of the proviso will lead to double whammy and create unnecessary administrative and tax compliances for the seller/ buyer.
16.	**Benefit of lower/ NIL tax collection certificate u/s. 206C(9) should also be extended to TCS on LRS remittances, overseas tour package, sale of goods and motor vehicles**	➢ **Rationale** ○ S. 206C(9) provides for collection of tax at lower rate as against relevant rate provided in the respective sub-section (1) of s. 206C for items such as alcohol, scrap etc. or sub-section (1C) of s. 206C for items such as parking lot, toll plaza etc. in case where the Assessing Officer is satisfied that the total income of the buyer/ licensee justifies collection of tax at a lower rate. Such certificate remains valid till the time it is cancelled by the Assessing Officer. ➢ **Amendment by FA 2020** ○ In order to widen and deepen the tax net, the FA 2020 extended the TCS obligation to authorised dealers who receive money for remittance outside under LRS u/s 206C(1G)(a) and to sellers of overseas tour package u/s 206C(1G)(b). In both the cases, TCS applies at the rate of 5% at the time of receipt or debit whichever is earlier, and in case of no PAN/ Aadhaar, the TCS rate is increased to 10%. Further, it is also not extended to sale of

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		goods by s.206C(1H). ➢ **Issue** o The benefit of availing lower tax collection certificate as provided for transactions covered under section 206C(1)/(1C) is neither provided in sub-section (1G)/(1H) nor sub-section (9) of s. 206C. o The policy rationale for non-extension of lower TCS benefit to transactions of LRS, overseas tour package and sale of goods as distinguished from other TCS provisions is not clear. o Further, apart from the above newly introduced provisions, such benefit is also not extended to s. 206C(1F) dealing with TCS on sale of motor vehicles. ➢ **Recommendation** o It is recommended that the benefit of availing lower tax certificate may also be extended to TCS u/s. 206C(1G) charged @ 5% on remittances outside India through LRS and overseas tour package, TCS u/s. 206C(1H) on sale of goods as also u/s. 206C(1F) on sale of motor vehicles. **Defer date of applicability of new TCS provision to 1 April 2021** o For the reasons elaborated earlier for deferring applicable date of new TDS provision u/s. 194-O, it is recommended that the effective date of the new TCS provision u/s. 206C(1G)/(1H) may also be further deferred till 1 April 2021.
D.	**Equalisation levy**	
17.	**Defer Equalisation levy (EL) on 'E-commerce Supply**	➢ **Background and Issue** o The outbreak of Novel Corona Virus (COVID-19) across many countries of the world has caused immense loss to the lives of people, and accordingly, it has been termed as pandemic by the World Health Organisation and various Governments including Government of India. The COVID-19 pandemic has caused disruptions across

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	or Services' in view of unprecedented circumstances involving COVID-19	the world, including India. This has resulted in a rapidly slowing economy, which some believe is showing recessionary trends. Social distancing has been unequivocally accepted to be the best way to contain its spread, leading to announcement of complete lockdown in the country and difficulty faced by the taxpayers in complying with statutory and regulatory requirements. ○ Rightfully acknowledging such challenging time and difficulties faced by the taxpayers, the Finance Minister of India, Nirmala Sitharaman, announced certain measures on 24 March 2020 to ease the statutory and compliance burden. The relaxation measures included extension of various due dates from 31 March 2020 to 30 June 2020 including due date of filing belated and revised tax returns for tax year 2018 -2019, specified date under "The Direct Tax Vivad Se Vishwas Act, 2020". ○ Amidst such situation, the intent of Government in expanding scope of EL at enactment stage as a surprise package is not clear. ➢ **Recommendation** ○ Keeping the severity of the circumstances in mind, it is represented that the EL on e-commerce supply and services (ESS EL) be deferred till 1 April 2021. ○ Further, India is wedded to the consultative and transparent process of formulating its tax policy. This has been widely appreciated. It would, therefore, be desirable that the levy is introduced after proper consultation and after ensuring that taxpayers are ready with the understanding and implementation of the levy. Without prejudice, to begin with, the text of levy may be restricted to avoid those items which are perceived to be highly controversial. ○ Such step will help all stakeholders to comply with the newly introduced provisions once the global economy will be on the path of revival and also boost confidence of non-residents digital players to operate and undertake business with India elevating Indian economy as well after having faced the impact of pandemic.
18.	**Clarify explicitly that EL is a temporary**	➢ **Background** ○ As part of Action Plan 1 of BEPS and in furtherance of global efforts, it is expected that concerns arising from new form of digital businesses particularly in the area of nexus, data and characterisation will be addressed. As

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	measure while global consensus on taxation of e-commerce is achieved under BEPS 2.0 Pillar One. Accordingly, once India adopts direct tax measures pursuant to OECD BEPS agenda in which India is participating actively and on equal footing, EL will be abolished	part of BEPS 2.0 Pillar 1, a framework has been agreed and work is in progress to allocate taxing rights to market jurisdictions. ○ The above work is expected to achieve global consensus by the end of 2020. The efficacy of such global measure is highly dependent on uniform approach to be adopted by each member country. Any unilateral measure is not only inconsistent with global agenda but is also likely to result in undesirable multiple taxation without even the effective opportunity of eliminating such multi taxation. ○ Recognising India's commitment to global consensus, the provisions of Significant Economic Presence as a nexus for taxing business profits has been deferred by Finance Act 2020 to 1 April 2021 from the earlier scheduled date of 1 April 2020. ➢ **Recommendation** ○ In tandem with the above spirit, we understand that EL is a transit measure and will be abolished once global consensus is achieved. In our informal discussion with Government official, we understand such is the view or thought process of Government. This may kindly be followed up with an official communication for clarity. ○ An explicit statement to the above effect will send assuring signals to the investors particularly as the scope of EL as now applicable is fairly wide.
19.	**Need to provide for Explanatory Memorandum and object and purpose of the amendment**	➢ **Background and Issue** ○ ESS EL came to be inserted under unprecedented circumstances. Customary Explanatory Memorandum and object statement supporting the levy are not available. ○ The language of the provisions as can be seen from the subsequent paras are susceptible to alternative interpretations and are likely to create significant uncertainty on scope and magnitude of the levy. ○ As we understand basis informal view expressed by a Government official, there is an acknowledgement of the need to provide for clarifications, FAQs and illustrations. Since ESS EL is likely to be cost of doing business without ability of claiming credit in home country, it is likely to have significant impact for the businesses where the margins are slender, or the businesses are operating under losses. Since the levy can have

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		significant impact on businesses particularly during the current scenario, it is utmost advisable for the businesses to have clarity on scope of their obligation and cost. ➢ **Recommendation** ○ Hence, it is urged that a guidance or a clarificatory statement be issued which will reflect the intention of Government at this juncture and also serve as an aid to the industry stakeholders and the consultants/ advisers while interpreting the new provisions. ○ Since the levy has already trickled in, the clarifications may be provided at the earliest. Alternatively, this may also be the basis for deferral of the levy.
20.	**Clarify that ESS EL is restricted to highly digitalised products and services and do not extend to goods and services which are physical in nature and where e-commerce merely facilitates communication, placement or conclusion of order**	➢ **Background and Issue** ○ Till 31 March 2020, the Chapter VIII of Finance Act 2016 levied EL in respect of online advertisement and provisioning of digital advertising space. The levy was with an understanding that targeted online advertisement primarily generate revenue based on user data collected by social networking platforms. ○ Comparable to the above, there are businesses which are able to operate virtually since the products or services are themselves digitalised. The examples of this include online content streaming, online music, online games, online support services, etc. These businesses are location agnostic and may sought to be covered as comparable with EL on online advertisement. The provision makes this aspect clear when it refers to "e-commerce supply or sale" and seeks to cover "online provision of services" and "online sale of goods" along with the facilitation of such sale or provisioning through an electronic or digital platform. ○ There are apprehensions raised about applicability of ESS EL to pure Brick and Mortar structure where digital or electronic facility is utilised not for availing the service but merely for seeking information or for confirming the booking. There is an apprehension that mere use of email or telephone or use of corporate website of the non-resident for placing order or for booking of services may also get captured by ESS EL. ➢ **Recommendation** ○ It may be appropriate that the coverage of digitalised business aligns with global discussion, which intends to

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		capture highly digitalised businesses. Thus, there is a strong and urgent need to clarify that such incidental or trivial role played by electronic or digital facility is not sought to be covered. The primary object of such business continues to be purchase of physical goods or availment of physical services. To illustrate, it may be clarified that services of overseas hotels, amusement parks, overseas hospitals for critical illness, etc. are not covered merely because booking is done with the help of email or with the help of interactive website maintained by the service provider or the seller of goods. o Reference may be made to definition of Online Information Data Base Access and Retrieval (OIDAR) under GST Act which covers services provided through the medium of internet and received by the recipient online without having any physical interface with the supplier of such services. e.g. downloading of an e-book online for a payment would amount to receipt of OIDAR services by the consumer downloading the e-book and making payment. o Without prejudice, comparable digital taxes such as UK DST make an exception for physical retailers using online medium as incremental sales channel. o Separately, it may also be prudent to delete reference to "telecommunication network" in the definition of "online" in s.164(f) of FA 2016, so as to avoid chances of litigation and unintended coverage of transactions concluded on telephones or emails.
21.	**Clarify that the amount of consideration received or receivable by the e-commerce operator facilitating online sale of goods or online provision**	➢ Consider the following example: o BCo is e-commerce operator and owns, operates or manages BCo App. Drivers, resident individuals, are rendering cab services through digital platform of BCo, i.e. B Co App o Customers avail cab services online through B Co App and payment is made directly to B Co (say 100). B Co retains its service charges (say 30) and remits the balance amount to Drivers (i.e. 70). o The facts are schematically represented in the diagram below:

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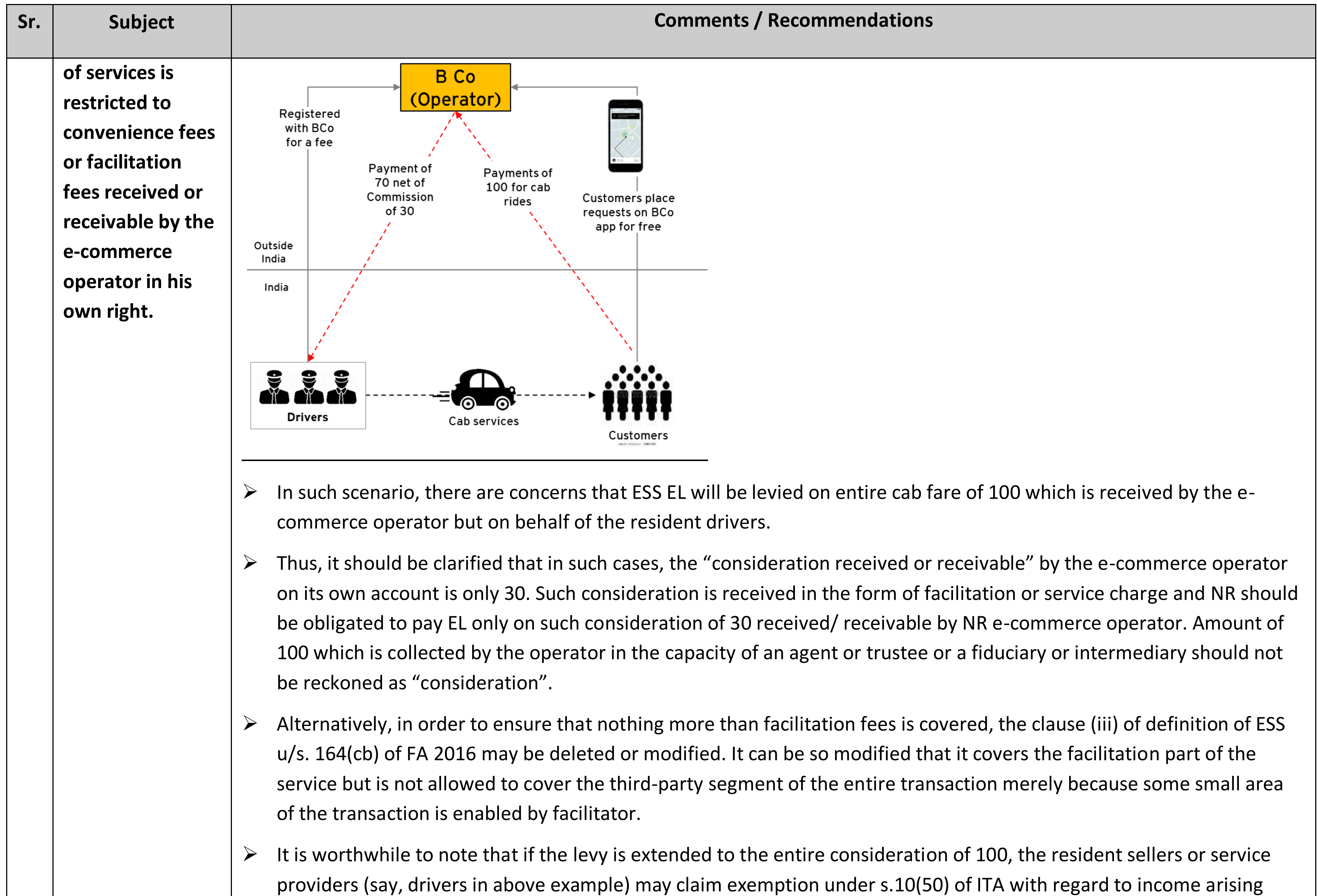
	of services is restricted to convenience fees or facilitation fees received or receivable by the e-commerce operator in his own right.	 ➢ In such scenario, there are concerns that ESS EL will be levied on entire cab fare of 100 which is received by the e-commerce operator but on behalf of the resident drivers. ➢ Thus, it should be clarified that in such cases, the "consideration received or receivable" by the e-commerce operator on its own account is only 30. Such consideration is received in the form of facilitation or service charge and NR should be obligated to pay EL only on such consideration of 30 received/ receivable by NR e-commerce operator. Amount of 100 which is collected by the operator in the capacity of an agent or trustee or a fiduciary or intermediary should not be reckoned as "consideration". ➢ Alternatively, in order to ensure that nothing more than facilitation fees is covered, the clause (iii) of definition of ESS u/s. 164(cb) of FA 2016 may be deleted or modified. It can be so modified that it covers the facilitation part of the service but is not allowed to cover the third-party segment of the entire transaction merely because some small area of the transaction is enabled by facilitator. ➢ It is worthwhile to note that if the levy is extended to the entire consideration of 100, the resident sellers or service providers (say, drivers in above example) may claim exemption under s.10(50) of ITA with regard to income arising

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		from 100 on the premise that the same has been subjected to ESS EL @ 2%. Such attempt of taxing gross consideration may have unintended litigation on the taxpayers insisting on EL and asking for exemption u/s. 10(50). Any such consequence may be counterproductive to the extent that the new provision will add to litigation in an enormous measure. ➢ Further, in certain cases, online sale transaction takes place through multiple e-commerce operators. Charging EL @ 2% to each e-commerce operator on total consideration of value of goods or services will result into multiple taxation with cascading effect and will increase the overall cost of entire transaction. For instance, in above example if even payment gateway is involved and subjected to EL on 100, it may lead to double taxation. This also supports that it is fair to restrict the levy only to the extent of service charge or facilitation fee in case of facilitation of online sale of goods or online provision of services.
22.	**Clarify that for each of the e-commerce operator, consideration excludes statutory levies such as GST, service tax or alike**	➢ **Background and Issue** o ESS EL is levied with reference to the amount of consideration received or receivable by e-commerce operator from the specified services. As stated above, consideration is the amount which a person receives in lieu of his discharge of contractual obligations. It is a part of quid pro quo of the contract. o In the context of various TDS provisions, CBDT has clarified that consideration for a given service is to be calculated without taking into account statutory levies which are collected for handing over to the Government. Refer CBDT Circular No. 1/2014 for service tax on rent and professional services and CBDT Circular No. 23/2017 on GST. ➢ **Recommendation** o In view of the foregoing, a suitable clarification may be provided that ESS EL will be levied with reference to consideration flowing to the operator and will exclude collections on behalf of Government such as GST.
23.	**Explicitly clarify that ESS EL is to be levied with reference to**	➢ **Background and Issue** o In case of sales of goods, sales returns are very common in both retail and wholesale scenarios. In certain categories like fashion merchandise, the returns can be as high as 25% of the sales.

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	actual consideration received and accordingly, consideration attributable to sales returns or credit notes given to the customers on account of claims will be deducted to determine the base which will be subject to ESS EL	○ TCS under CGST Act 2017 also calculated with reference to net value of taxable supplies" after reducing he aggregate value of taxable supplies returned to the suppliers during the month. ➢ **Recommendation** ○ Accordingly, without prejudice to our representation at para 18 above, it would be fair to restrict levy to consideration towards net sales. Also, the e-commerce operator should be permitted to make adjustment of sales returns and credit notes in the quarter of the financial year to which it pertains while doing quarterly compliance u/s. 166A of FA 2016. The fact that the related sale may pertain to earlier quarter may not be relevant consideration while granting reduction so long as such sale was considered for ESS EL in the earlier quarter.
24.	**Mismatch in applicability of effective date of ESS EL provisions and s.10(50) of ITA be rectified to state that s.10(50) also applies from FY 2020-21**	➢ **Background and Issue** ○ As a consequential amendment to expansion of scope of EL, s.10(50) of ITA has been amended to state that income arising from any "e-commerce supply or services" made or provided or facilitated on or after 1 April 2021 and chargeable under EL chapter shall be exempt from income tax. ○ While exemption u/s. 10(50) of ITA is applicable to income arising on or after 1 April 2021; on other hand, the ESS EL provisions apply from 1 April 2020. For consideration which is subjected to ESS EL for the period 1 April 2020 to 31 March 2021, there is no corresponding exemption to income arising from such consideration. In other words, while the charge of EL will apply w.e.f. 1 April 2020, the exemption from income tax will apply for ESS made or provided or facilitated on or after the 1 April 2021. ➢ **Recommendation**

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		○ Such date mismatch appears to be inadvertent error and it is urged that suitable amendment should be made to s.10(50) to make it effective from 1 April 2020 i.e. FY 2020-21. Needless to state, where provisions of ESS EL are deferred (as requested in para 15 above), the consequential amendment be made to s.10(50) as well to bring it at par with effective date of ESS EL.
25.	**For ESS EL, scope of "goods" and "services" to exclude financial instruments, insurance, forex derivatives, actionable claims, shares, securities, bonds, debentures, etc.**	➢ **Background and Issue** ○ ESS EL applies to online sale of goods or online provision of services or facilitation thereof. The terms "goods" or "services" are not defined. Reference can be made to definitions under CGST which exclude share, securities, money, actionable claims from scope of TCS. ➢ **Recommendation** ○ Thus, it is recommended to introduce suitable definition to exclude certain items like shares, securities, money, actionable claims from scope of "goods" and "services".
26.	**Measurement/ attribution issue**	➢ Basis the guidance provided under Report of the Committee on Taxation of E-Commerce, it appears that basis of 2% tax effectively is derived based on 5% margin attributable to India operations, which is taxable at 40%. For MNC groups already present in India through their local subsidiaries, this is an incremental tax on 5 % margin in addition to what the local subsidiaries are already paying on a transfer pricing basis. ➢ Further, where global audited financials of e-commerce operator report losses for immediately preceding fiscal year, such companies should be exempt from EL. As per draft "CBDT proposal for amendment of rules for profit attribution to permanent establishment" dated 18 April 2019, loss making companies were supposed to be 2% and even if that guidance were to be accepted, the rate of tax for loss making companies cannot be in excess of 0.8% and such EL paid should be allowed to be credited in future. ➢ With the scope of EL, and the low threshold of 2Cr, companies at various levels of growth maturity – right from start-ups to unicorns to large MNC would get covered. Equally, the products and services they deal with, will have very

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		different margin scenarios. This problem is also recognised by BEPS Pillar 1. ➢ Therefore, to tax every company at such a high attribution % may not be fair. Accordingly, it is urged that provisions similar to s.197 of ITA can be introduced in EL chapter such that business models with lower or no profits can apply for a lower tax certificate and EOP can pay EL at such lower % on consideration.
27.	**Scope of s.163 under the ITA to be curtailed with regard to EL**	➢ S.178 of the FA 2016 states that the provisions of Chapter XV of the ITA shall so far as may be, apply in relation to equalisation levy, as they apply in relation to income-tax. Chapter XV of the ITA provides liability in special cases and includes provisions with regard to representative assessee as well. S.163 of the ITA which provides meaning of agent with respect to NR provides various limbs and one such limb covers a person in India from or through whom the non-resident is in receipt of any income, whether directly or indirectly (S.163(1)(c) of the ITA). ➢ It may be noted here that the reason for shifting the compliance burden on NR for ESS EL is due to the fact that it captures even B2C transactions and making every customer who is in receipt of online sale or supply of services as agent of NR can become clumsy and non-feasible. On similar basis, it is prayed that limb (c) can be deleted or modified in a manner that liability of representative assessee is not cast on the customers in case of B2C transactions.
28.	**Guidance and clarity on determination of use of IP address in India**	➢ As per s.165A(1), a person using IP address in India is reckoned as a proxy to trigger ESS EL. ➢ It may be impractical for companies to keep track of the IP address of every user and data flows. It also raises questions regarding whether the IP address requirement is sufficient, reliable and verifiable indicator of nexus in all cases. ➢ Thus, it is imperative that a guidance about determination of IP address is provide
29.	**Clarity in cases where there is overlap between provisions of Equalisation Levy and income taxable under**	➢ **Background and Issue** o Based on the wide language of provisions of ESS EL, there can be situations where an underlying consideration can be subject matter of ESS EL and can also be taxable under the ITA. o For example, a licence granted by a NR to a resident to access a software application can fall within the ambit of definition of ESS under s. 164(cb)(ii) read with s. 165A(1)(i) of FA 2016 and can also be regarded as royalty u/s. 9(1)(vi)(b) of the ITA.

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	source rules of ITA	➢ **Recommendation** ○ There is no clarity on what should be the course of action in case of overlap between ITA and ESS EL provisions. ○ Hence, it is prayed that suitable clarification is introduced in line with S 165A(2), wherein certain transactions are outside the ambit of ESS EL, specifying how will the interplay between the transactions having an overlap between ITA and ESS EL be dealt with.
30.	**Where NR e-commerce operator has paid EL @2% and claimed exemption u/s. 10(50) but Tax Department disputes it to be royalty/FTS liable to income tax @ 10%, allow adjustment of EL tax as credit or set off against the income tax payable in India by non-resident in case of litigation on such characterisation**	➢ **Background and Issue** ○ As stated above, there can be overlap between provisions of FA 2016 and the provisions of ITA. Further, there can also be a situation where the NR e-commerce operator pays EL on the basis that there exists no permanent establishment (PE) in India, however in appellate proceedings, it is finally concluded that e-commerce operator has a PE in India and hence the income is taxable under the provisions of ITA and not under FA 2016 due to S 165A(2)(i). ○ In such cases, an issue arises as to how should the EL tax which has been paid initially by the e-commerce operator be treated? Whether e-commerce operator can claim a refund of the same or whether the EL tax can be adjusted/set off against the tax payable under the ITA? ➢ **Recommendation** ○ It is prayed that in the absence of any clear directions in this regard, the amount paid as EL should be treated as advance tax for ITA purposes and accordingly, the amount should be available for set off/adjustment against the income tax payable under the ITA.

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31.	**Compliance burden on NR e-commerce operator to be eased**	➢ **Background and Issue** ○ Under the ESS EL provisions, the compliance burden is cast on the NR e-commerce operator as compared to the EL provisions of 2016, wherein the compliance burden was cast on the payer (being resident in India or NR having a PE in India). ○ The scope of ESS EL is very wide and charge is created even in cases where the consumption of goods/ services is pursuant to an IP address located in India. ○ Considering that the levy is broad and can include NRs who do not have nexus in terms of business in India, imposing compliance burden in terms of filing quarterly returns, obtaining PAN, digital signatures certificates (DSC), etc can go against the basic principles of ease of doing business in India and can have an impact on how India is pursued by non-residents. ➢ **Recommendation** ○ It is prayed that a mechanism can be adopted for compliance whereby an authorised representative in India can do the compliance without saddling the NR with compliances in terms of PAN, DSC, returns etc. or there can also be a mechanism wherein certain thresholds are specified which exempts the NR from undertaking compliances in India on similar lines as found under ITA, say S.115A wherein return obligation is done away with subject to conditions.
32.	**Eligibility to claim ESS EL as a foreign tax credit (FTC) in the country of residence**	➢ **Background and Issue** ○ As per s.165A, ESS EL is a charge on consideration received or receivable by e-commerce operator from ESS made or provided or facilitated to specified persons. The charge of ESS EL is on the e-commerce operator. ○ Further, the income from ESS operations are likely to be taxed in the hands of the e-commerce operator in its resident country as well. ○ There is no clarity on whether ESS EL can be claimed as a credit against taxes payable in respective resident countries and whether ESS EL can fall within the ambit of 'tax' as defined under the respective tax treaties. ○ In cases where ESS EL paid in India is not allowed as credit (FTC) against taxes on the concerned income

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		payable by such NR in its resident country, the same would result in double taxation and this will go against intent of the legislature as well as against the spirit of tax treaties. o The fact that tax is levied as part of a separate chapter (Chapter VIII under FA 2016) or independent of Income-tax laws, or that it is levied on consideration received/receivable rather than taxable profits is no justification for its exclusion from the meaning of income tax. o Also, the fact that the administration and implementation of EL is by tax authorities under ITA also support this view. o Levy of EL without benefit of tax credit in resident country would result into an additional tax cost in the hands of NR service providers doing business in India. This will also discourage Foreign Service providers to enter into Indian markets. ➢ **Recommendation** o Hence, to avoid double taxation and additional cost, it is recommended that it may be clarified that EL is a tax on income and this clarification will mitigate double taxation for taxpayers. o Similar concerns arise in case of resident vendors/ operators as well. It is worthwhile to note that a lot of countries are also taking unilateral measures to levy tax on digital transactions. Thus, Indian exporter selling online goods or providing online services may be subjected to such levy in the other country and also suffer taxation in India, being a resident state. Suitable credit mechanism may also need to be developed in order to eliminate double taxation.
E.	**Change in tax registration norms for charities**	
33.	**Defer the new registration requirements to**	➢ **Rationale** o FA 2020 has revamped the entire process of obtaining and continuing registration under s. 12A / s. 12AA of the

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	1 April 2021	ITA for existing registered trusts as well as new trusts. ○ As explained in the Explanatory Memorandum to FB 2020, the intention of such proposal is to ensure that the conditions of registration are adhered to ensure continuance of exemption. This is also for having a non-adversarial regime and not conducting roving inquiry by the tax authority in the affairs of the exempt entities on day to day basis. ○ The proposed provision provides for different period of limitation for making an application of registration for different classes of trusts for the purposes of claiming benefit of s. 11 and 12 of the ITA. For example, an existing charitable trust registered as on 1 June 2020 will have to make an application for fresh registration under the new provisions within a period of 3 months, for renewal of registration earlier granted under s. 12AB of the ITA, the trust is required to approach the tax authority at least 6 months prior to the expiry of registration etc. ○ Also, the trust will be granted either provisional registration or final registration depending on the respective clause of s. 12A(1)(ac) under which the registration was sought. ○ However, there is no change in the powers of the tax authority for cancelling the registration. In other words, the powers of tax authority enabling cancellation of registration are not modified and it may be cancelled by the tax authority at any point of time subject to certain conditions. ○ The proposed provision is very complex and bifurcated into multiple scenarios. Some of the scenarios contemplated under s. 12A(1)(ac) are even overlapping which will create further confusion and ambiguity. ○ Also, there are different time limits depending upon specific fact pattern under which the trust falls and even delay of one day in adhering to such strict time limits is prone to adverse consequences such as loss of exemption for the year in which delay took place. ○ The new provisions propose to convert the present system of 'rule of exception' to new system of 'rule of compulsion'. Presently, the trust's registration can be cancelled only if it is found that the trust's activity is not carried on in required manner. Otherwise, there is no adverse impact on such registration. Separately, the Assessing Officer has independent power to verify the claim of the taxpayer on year on year basis as per the

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		provisions of s. 11 to 13 of the ITA. ○ Therefore, there are enough safeguards in the present statute for keeping check on the activities of the charitable trust and hence, presently there is no need for any change in the process of registration. ○ Assumption in the Explanatory Memorandum that the trusts are being harassed on day to day basis by conducting roving inquiries doesn't appear to be correct. Assuming that is true, the solution should be to insert a provision which is deterrent to erring officials, alternative of the new registration regime is to push the taxpayer to the Tax Authority who are privy to such alleged harassment. Thus, the remedy is counter-productive and will create greater harassment for the trusts. ○ It does not appear to be logical that, at the end of 5 years, each trust automatically loses exemption even if it might have conducted its activities without any blemish. It would put a vast and predominant number of trusts to regular hardship in an effort to find out a handful wrong doers. ○ As per amended s. 12A(1)(ac)(i), the existing charitable trusts, who are registered as on 1 June 2020, are required to make an application for obtaining registration under s. 12AB within a period of 3 months from the effective date of the new provision (i.e. 1 June 2020). ○ In view of the above, all the existing charitable trusts registered under s. 12A / 12AA of the ITA are required to make an application on or before 31 August 2020 without default. The registration process is likely to be extensive requiring furnishing of lot of information which will be an onerous requirement for charitable trusts ○ Also, there is no back-up provision for cases where there is genuine delay by such trusts. As per amended provision, if there is delay even of one day (for any reason), the case of such trust will fall in the residuary clause of s. 12A(1)(ac)(vi). Consequently, the registration of the trust will be granted provisionally effective from the next financial year and not from the financial year in which the application was made ➢ **Recommendation** ○ The provisions require a thorough rethink of problems arising for charitable trusts. In any case, implementing the new law during current Covid 19 pandemic period will pose immense challenges for charitable trusts as also the Tax Department. The current priority for both charities and Government is to tackle the human and

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		economic impact of Covid 19. o Since the Government has already extended several tax compliances falling due during the period from 20 March 2020 to 29 June 2020 and also reserved power to extend it further in the Ordinance promulgated on 31 March 2020, it is recommended that the new registration related provisions for charities may be further postponed till 1 April 2021.