

# Technical Analysis of FB 2019

Bhaumik Goda

Saumya Sheth

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**BGSS & Associates**

Chartered Accountants

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Where Passion Delivers Value

# Foreign Investment

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# Policy announcements

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## **Investment push for NRIs:**

- Finance Minister made policy announcement of merging NRI-Portfolio Investment Scheme Route with the Foreign Portfolio Investment Route
- Specific amendments in Foreign Exchange Management Act, 1999 yet to be notified

## **Relaxation of FPI:**

- Expansion of list of instruments into which FPIs can invest, to include listed debt securities issued by REITs and InvITs.
- Permit FPIs to sell investments in debt securities of Infrastructure Debt Fund – Non-Bank Finance Companies (IDF-NBFCs) to any domestic investor within the applicable lock-in period
- Existing Know Your Customer (“KYC”) norms applicable to FPIs are proposed to be rationalized and streamlined, to make them investor friendly and promote ease of investment.
- FPIs will be permitted to invest in listed companies up to the relevant sectoral cap, but the Indian companies will have an option to limit this investment to a lower threshold.

# Policy announcements

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## **Liberalization of FDI – Policy announcements**

- 100% FDI is permitted under the automatic route in the insurance sector
- Relaxation under consideration for FDI in Aviation, Media and insurance sectors
- Single brand retail – Relaxation in local sourcing requirement
- Will need to wait for specific amendments to FEMA for above liberalisation

# Investment in Sunrise & Technology sector

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## **Tax exemption under section 35AD:**

- Finance Minister in Budget Speech announced that investment linked exemptions under section 35AD would be extended to sunrise & advance technology sectors like following:
  - Semi-conductor Fabrication (FAB);
  - Solar Photo Voltaic cells;
  - Lithium storage batteries;
  - Solar electric charging infrastructure;
  - Computer Servers, Laptops, etc.
- Move in line with India policy initiatives to reduce import for solar manufactures, usher data localisation and increase employment
- However no amendment has been proposed in Finance Bill 2019 to give investment linked benefit to above sectors

# Super Rich Tax

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# Increase in Surcharge

- Increase in Surcharge for individual earning income above 2 crs

Individual	0 – 50 L	0.50 – 1crs	1 – 2	2 – 5	5 and above
<b>MMR</b>	30%	30%	30%	30%	30%
<b>Surcharge</b>	Nil	10%	15%	25%	37%
<b>Tax Rate (inclusive Surcharge)</b>	30%	33%	34.5%	37.5%	41.1%
<b>Cess</b>	4%	4%	4%	4%	4%
<b>Tax Rate</b>	31.2%	34.32%	35.88%	39%	42.744%
<b>Pre-amended rate</b>	31.2%	34.32%	35.88%	35.88%	35.88% (Note 1)
<b>Dividend Income above 10 L</b>	10%	10%	10%	10%	10%

Note 1: Earlier surcharge of 15% for income exceeding Rs. 1 crores now replaced with 25% and 37% for income between Rs. 2 crs to 5 Crs and above respectively.

# Scope of levy

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## Scope

- Increased surcharge is applicable to individual, HUF, AOP, BOI and artificial juridical person

## AOP

- Increased rate likely to be detrimental to AOP formed for executing project under consortium arrangement

## Artificial Juridical Person

- AJP will be assessed to higher tax which may include
  - Bar Council
  - Idol
  - Diety



# Scope of levy

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## Specific Trust

- In case of Specific Trust, income is assessed in hands of representative assessee in same manner and like extent as that of beneficiary. Accordingly, status of beneficiary would be relevant

## Discretionary Trust

- Discretionary Trust are not separate person under Act. Courts in following cases has held discretionary Trust to be individual
  - CIT v SAE Head Office Monthly Paid Employees Welfare Trust [2004] 141 Taxman 364 (Delhi)
  - CIT v. Food Corpn. of India, Contributory Provident Fund Trust [2009] 177 Taxman 224 (Delhi)

# Tax Arbitrage

- Tax Arbitrage – Essential to select appropriate entity for doing business

Type of Person	Individual	LLP	Company*
Income (i)	15 crs	15 crs	15 crs
Tax Rate (including Surcharge and cess) (ii)	42.744%	34.94%	29.12%
Tax (iii) = (i)*(ii)	6.41 crs	5.24 crs	4.37 crs
Profit available for Distribution (iv) = (i)-(ii)	N.A.	9.76 crs	10.63 crs
Rate of Dividend Distribution Tax (v)	N.A.	Exempt	20.56%
Distribution Tax (vi) = (iv)*(v)	N.A.	Nil	2.19 crs
Balance income (vii) = (iv) – (vi)	N.A.	9.76 crs	8.45 crs
Rate of Tax on dividend exceeding 10 lakhs (viii)	N.A.	N.A.	10%
Tax on dividend exceeding 10 lakhs (ix) = (vii)*(viii)	N.A.	N.A.	0.84
<b>Net Income in the hands of Individual (x)</b>	8.59 crs	9.76 crs	7.6 crs
<b>Effective tax rate (xi) = (x)/(i)</b>	<b>42.744%</b>	<b>34.94%</b>	<b>50.68%</b>

\*Note 1: Based on the assumption that turnover of company will be below Rs. 400 crs

# Interest liability on shortfall of advance tax

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- Increase in surcharge is effective from FY 2019-20 for which advance tax instalment in June has already been paid based on lower tax rates resulting into shortfall of advance tax
- As per section 294 of the Act, provisions proposed in Finance Bill and that in force in preceding assessment year, whichever is more favourable would be applicable
- Finance Act 2019 introduced on 1 February 2019 provided for continuity of existing rate for FY 2019-20, it is doubtful whether benefit of section 294 can be availed by company given that there is an Act for charging of income-tax for FY 2019-20
- Additionally, support can be drawn from following judicial precedents which have held that no interest under section 234C is leviable for any shortfall of advance tax due to retrospective amendment in the Act
  - CIT v National Dairy Development [2017] 83 taxmann.com 109 (Gujarat)
  - Emami Ltd v CIT [2011] 12 taxmann.com 64 (Calcutta)

# Business Restructuring

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# Buy back of shares of listed company

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## Background

- FA 2013 introduced buy back tax (section 115QA or BBT) to tax unlisted company at 20% on buy-back of its shares and exempt consideration in hands of shareholder
- Buy back of shares of listed company was taxed in hands of shareholder
- FA 2016 introduced tax at 10% on dividend received in excess of Rs 10 lakhs
- Memorandum notes practice of listed companies resorting to buy-back instead of declaration of dividend to save on tax
- FB 2019 expands scope of section 115QA to include all companies including listed company within the scope of provisions.
- Post amendment, buy back will be taxable at Company level and exempt in hands of shareholders in all cases

# SEBI Guidelines

- SEBI (Buy-back of Securities Regulations) 2018 permits following modes of buy back

## Buy back through tender offer

- Company fixes a buyback price and accepts shares on a proportionate basis during the buyback period
- Shareholders will be sent a letter of offer; a form is to be filled in with the necessary details and sent back to the company accompanied by the required documents



## Buy back from open market

- Company specifies a maximum price and buys back shares from the market during a defined time period
- Although the company may declare a maximum buyback price, it does not mean that the investors who sell during the buyback period will realise that maximum price
- Company can buy in tranches at different prices

# Taxability pre-amendment

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## Tax on Buyback

- Taxability depends whether shares are held as capital asset or stock in trade
- Taxable as business income if shares are held as stock in trade:
  - Possible to set off brought forward losses
  - Possible to set off gains on Script A (buy back) with loss from Script B (secondary market sale)
  - Taxed at rate applicable to company (higher than BBT rate)
- Investment by FPI deemed to be held as capital asset
- Shares held as capital asset subject to capital asset and computed in accordance with section 46A read with section 48

# Taxability pre-amendment

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## Tax on Buyback

- Rate of tax depends upon period of holding
- STCG taxed at 15% under section 111A
- LTCG on Buy back of shares on which STT is paid:
  - No tax if LTCG is less than Rs 1 lakh;
  - LTCG in excess of 1 lakh taxable at 10% without benefit of indexation or foreign exchange fluctuation;
  - Gain accrued on equity shares till 31 January 2018 exempt by providing cost step up in cost of acquisition formula;
  - Notification No 60/2018 grants aforesaid benefit to shares acquired in certain modes even if no STT is paid;



# Taxability pre-amendment

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## Tax on Buyback

- LTCG on non-STT paid shares taxable under section 112 at 10% or 20% (after taking indexation benefit for resident shareholder)
- Individual and HUF can avail benefit of slab rate and no income is chargeable if LTCG or STCG does not exceed maximum amount which is not chargeable to tax
- LTCG or STCG included for MAT computation and accordingly MAT payable on such income
- Non-resident can avail treaty benefit and accordingly gains may not be chargeable to tax depending upon treaty and period of investment

# Buy back tax

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## Overview of existing section 115QA

- Additional income tax payable at 20% on distributed income ('DI') [S. 115QA(1)]
- DI means the consideration paid by the company on buy-back of shares as reduced by the amount which was received by the company for issue of such shares determined in the manner as prescribed under Rule 40BB
- BBT is payable even if no income tax is payable by domestic company [S. 115QA(3)]
- Principle officer of Company required to pay BBT within 14 days from date of payment of consideration to shareholder.

# Implication of changed regime

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- BBT payable at 20% irrespective of period of holding, whether shares were held by shareholder as capital asset or stock in trade, whether shareholder paid STT at the time of acquisition of shares, mode of acquisition of share
- Neither Company nor shareholder can set off its brought forward losses resulting in higher economic taxation
- Buy back taxable in hands of company irrespective of quantum of consideration to shareholder. Thus, benefit of slab rate or Rs 1 lakh floor exemption not applicable
- Shareholder cannot avail benefit of section 54F
- Benefit of cost step up considering 31 January 2018 value not available as DI formula or existing Rule 40BB does not provide such benefit

# Implication of changed regime

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- Treaty benefit to tax resident of following countries will not be available as BBT is tax on company and not shareholder

Country	Relief
Mauritius, Singapore, Cyprus	<ul style="list-style-type: none"><li>• Gains from alienation of shares acquired prior to 1 April 2017 not taxable in India</li></ul>
Netherland	<ul style="list-style-type: none"><li>• Alienation of share of Indian company from non-resident to resident shareholder is taxable in India. However, gains realized on alienation is not taxable if it is realized in course of a corporate organization, reorganization, amalgamation, division or similar transaction</li><li>• Mumbai Tribunal in <i>Accordis Baheer BV</i> (66 taxmann.com 164) ruled that buy back is not covered by above exception</li></ul>

# Implication of changed regime

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- Treaty benefit to tax resident of following countries will not be available as BBT is tax on company and not shareholder

Country	Relief
France	<ul style="list-style-type: none"><li>• Gains from alienation of shares representing a participation of at least 10% in resident company is taxable in France</li></ul>

- Following are other practical challenges which taxpayer are likely to face:
  - BBT requires company to reduce amount received by it for issue of such share as determined under Rule 40BB. This is onerous task.
  - In tender offer it may still be possible by asking shareholders to provide proof of cost in terms of Rule 40BB. Considering various situations are covered by Rule 40BB, issue arises whether Company can compute BBT basis of declaration from shareholders?

# Implication of changed regime

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- Following are other practical challenges which Company undertaking buyback is likely to face:
  - Rule 40BB does not case of secondary acquisition and hence it will be difficult for company to compute BBT
  - Considering that BBT is additional tax on company and income is exempt in hands of shareholder, it is possible that shareholders may not provide cost details
  - In case of open market, it may be difficult to know 'amount received by company for issue of such share' as Buy back is undertaken like any other transaction of sale and purchase on stock exchange. It may not be correct to say that difficulty in obtaining cost information makes cost unascertainable and accordingly computation mechanism fails
  - From shareholder perspective, it may be difficult to know that shares sold under open offer where one bought by company and accordingly income is exempt . Regulation 17 of SEBI guidelines provides that identify of Company as a purchaser shall appear on electronic screen when order is placed

# Implication of changed regime

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- Following are other practical challenges which taxpayer are likely to face:
  - Section 115QA(3) requires principal officer to pay BBT within 14 days of payment of consideration. SEBI guidelines provides that buy back under open market shall open not later than 7 working days from the date of public announcement and shall close within 6 months from date of opening of the offer. Accordingly, listed company will need to monitor buy back and pay BBT at multiple intervals to comply with law
  - Income of shareholder is exempt under section 10(34A). Appears drafting lacuna that words 'not being company in which public are substantially interest' is not deleted
  - Consideration received by shareholder not subject to MAT as Explanation to section 115JB provides for reduction of section 10 income

# Implication of changed regime

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- Provisions are applicable to any buy back of shares undertaken on or after 5 July 2019. Thus, amendment is in a way retroactive
  - Section 294 reads 'if on the 1<sup>st</sup> day of April in any assessment year provision has not yet been made by a Central Act for the charging of income-tax for that assessment year, this Act shall nevertheless have effect until such provision is so made as if the provision in force in the preceding assessment year or the provision proposed in the Bill then before Parliament, whichever is more favourable to the assessee, were in force
  - Finance Act 2019 introduced on 1 February 2019 provided for continuity of existing rate for FY 2019-20, it is doubtful whether benefit of section 294 can be availed by company given that there is an Act for charging of income-tax for FY 2019-20



# Ind AS accounting for demerger

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- Under Ind AS – 103 provides for accounting of business combination which includes demerger
- Ind AS 103 provides that acquiree under common control transaction should account transaction at book value and for transaction other than common control at fair value
- Section 2(19AA)(iii) provides that property and liabilities of the undertaking being transferred by the demerged company are transferred at values appearing in its book of account
- Accordingly, doubts were raised whether accounting of demerger by resulting company at fair value violates section 2(19AA)(iii)
- Proviso now inserted to remove aforesaid difficulty making clause (iii) inapplicable if resulting company records transaction at fair value
- Arguably, even though amendment is stated to be prospective should have retrospective application as said amendment is remove difficulties faced by Taxpayer

# Prevention of Mismanagement & Oppression

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## Section 115JB – MAT provisions relaxation

- Aggregate of unabsorbed depreciation and brought forward losses allowed as deduction in case of Company, its subsidiary and its step down subsidiary, where, the Tribunal, on an application moved by the Central Government under section 241 of the Companies Act, 2013 relating to oppression and mismanagement has suspended the Board of Directors of such company and has appointed new directors

## Section 79 – Brought forward losses

- No lapse of brought forward losses for company, its subsidiary and step down subsidiary even if there is substantial change in beneficial ownership if following conditions are satisfied cumulatively:
  - **Condition 1** - Tribunal, on an application moved by the Central Government under section 241 of the Companies Act, 2013 relating to oppression and mismanagement has suspended the Board of Directors of such company and has appointed new directors; **AND**
  - **Condition 2** - Change in shareholding has taken place in a previous year pursuant to a resolution plan approved by the Tribunal under section 242 of the Companies Act, 2013; **AND**
  - **Condition 3** - Resolution Plan is approved after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner

# Prevention of Mismanagement & Oppression

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## Section 79 – Brought forward losses

- Interestingly, benefit is extended to Company, subsidiary and its step down subsidiary
- Proposed section 79(2)(c) extends benefit only to a company whose resolution plan is approved under IBC 2016. Benefit is not extended to such Company subsidiary and its step down subsidiary
- There is an ongoing debate whether for trigger of section 79 - change in ultimate shareholder needs to be seen or immediate shareholder. Differentiation between proposed section 79(2)(d) and section 79(2)(c) is only likely to accelerate the debate

# International Taxation

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# AID proceeding for payment to NR

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- In case of failure to deduct tax on payment to non-resident following consequences arises
  - Total disallowance of payment under section 40(a)(i)
  - Deem payer to be AID (accordingly responsible for payment of tax otherwise payable by NR and interest)
- Finance Act 2012 introduced provision to make aforesaid provision non applicable if recipient resident filed its tax return, disclosed such amount and paid tax thereon
- Aforesaid amendment was only applicable to recipient resident and did not extend to NR. Post FA 2012 a view was possible to extend such said provision to recipient NR on applicable of non-discrimination clause of relevant tax treaty
- Now, FB proposes to remove said anomaly by extending benefit to NR as well and treat NR at par with R

# AID proceeding for payment to NR

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- Amendment stated to be effective from 1 September 2019
- Even though amendment is prospective it may be possible to take a view that amendment is retrospective and benefit of amendment should be granted to past cases
- Anomaly still exists between payment to R and NR as section 40(a)(ia) makes only 30% disallowance of amount in case of payment to R whereas section 40(a)(i) disallows it to the extent of 100%
- A view can be taken that 30% disallowance provision should also apply to payment to NR on application of non-discrimination clause

# Secondary Adjustment

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- Trigger point for SA is primary adjustment (PA) to transfer price in following cases:
  - Voluntarily by assessee in ROI
  - Made by AO and accepted by Assessee
  - Determined under APA
  - Made as per safe harbour rules
  - Resulting from MAP proceeding
- Law requires assessee to make SA i.e. adjustment in books of account of assessee and its AE to reflect that actual allocation of profits between the assessee and its AE to remove imbalance between cash account and actual profit of the assessee
- SA ensures recognition of difference between transaction price and ALP in books and thereby subject said difference to MAT as also record receivable from AE

# Secondary Adjustment

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- PA if not repatriated to India within the prescribed time, shall be deemed to be an advance made by assessee to such AE. Also, interest on such advance shall be computed in the hands of the assessee at prescribed rate
- FB 2019 proposes following clarificatory amendment with retrospective amendment:
  - Exemption of de-minimus limit of 1 crs and grandfathering of PA upto AY 2016-17 are separate exemption
  - Interest only on outstanding amount not paid within prescribed time
  - SA applicable only to APA signed after 1 April 2017
- Memorandum states that said amendment are for effective implementation of SA regime and clarify law
- Expressly stated to be with retrospective effect



# Secondary Adjustment

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- Section 92CE(2) states excess money or part thereof which is available with its AE, if not repatriated to India within prescribed time shall be deemed to be an advance made by assessee to such AE and interest on such advance shall be computed in prescribed manner
- Explanation to section 92CE(2) inserted to clarify that excess money or part thereof may be repatriated from any of the AEs of the assessee which is not resident in India
- Explanation inserted with retrospective effect
- Following are other facets of Explanation
  - AE repatriating fund need not be same as AE which entered into transaction
  - Such AE may be an AE which is not even party to international transaction
  - Cannot be treated as dividend if ICO subsidiary with surplus cash repatriates amount outstanding from other AEs

# Secondary Adjustment

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- Section 92CE(2A) inserted which provides option to assessee to pay additional income tax at 18% on excess money or part thereof if said amount is not repatriated within prescribed time
- Consequential provisions:
  - Section 92CE(2B) assessee or any other person to claim credit for tax so paid
  - Section 92CE(2C) prohibits deduction under any other provisions of Act in respect of amount on which tax has been paid under 92CE(2A)
  - Section 92CE(2D) provides where tax is paid by assessee he shall not be required to make secondary adjustment under sub – section (1) and computed interest under section 92CE(2) from date of payment of tax
- Option to pay tax can be exercised on expiry of prescribed period to repatriate money into India or any time thereafter after expiry. This is supported by section 92CE(2D) which stops interest computation from date of payment of tax

# Secondary Adjustment

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- Tax paid under section 92CE(2A) is additional income tax and needs to be paid irrespective of current year loss or past brought forward loss, whether in year of payment of tax assessee is assessed under MAT
- Section 92CE(2D) states that once tax is paid assessee shall not be required to make secondary adjustment. Accordingly, amount recorded as loan in books can be written off
- Section 92CE(2C) prohibits deduction under any other provisions of this Act for such write off
- Issue arises whether write off and tax paid under section 92CE(2A) needs to be added back for MAT
  - Explanation 1 to section 115JB has no explicit provision for adding back of such write off. Section 92CE(2C) arguably not applicable as computation of MAT does not recognise concept of deduction
  - Clause (a) of Explanation 1 provides for increase of book profit by amount of income tax paid or payable. Explanation 2 to section 115JB defines tax inclusively and includes additional tax like DDT. No amendment made in Explanation 2 to include additional tax paid under section 92CE(2C)

# Transfer Pricing Provisions

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## **Section 92D – Maintenance of document**

- Section 92D amended to provide that Master File to be maintained by every person, being constituent entity of an international group irrespective of it entering into any international transaction or not during the year
- Power of AO / CIT(A) to ask for Master File withdrawn
- Post amendment, Master File to be furnished only with prescribed authority

## **APA**

- Power of AO limited to only modifying the return filed by assessee upon conclusion of APA and not assess or reassess any other issues

## **Section 286 – Furnishing of Country by Country Report**

- Provisions clarified to provide that accounting year for Alternate Reporting Entity which is based in India but whose ultimate parent is not resident in India will be the same as that of parent entity

# Gift between resident and non resident

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- Under section 5(2), in case of non-resident, income received or deemed to be received in India or income which accrues or arises or deemed to accrue or arise is chargeable to tax
- Rationale in Memorandum:

“It has been reported that gifts are made by persons being residents in India and are claimed to be non-taxable in India as income does not accrue or arise in India”
- Section 9(1)(viii) inserted to tax income referred in section 2(24)(xviiia)
- Said section says any sum of money or value of property referred in section 56(2)(x). Section 56(2)(x) seeks to tax ‘receipt’ of specified property
- Section 9(1)(viii) deems following income to accrue or arise in India

‘income of the nature referred in sub-clause (xviiia) of clause (24) of section 2 arising from any sum of money paid or any property situated in India transferred, on or after 5 day of July 2019 by a person resident in India to a person outside India’

# Gift between resident and non resident

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- Law covers within its fold a) any sum of money paid and b) any property situated in India transferred
- Clause a) does not require money to be in India. Accordingly, money kept in foreign bank account and subsequently gifted falls within purview
- Law provides that exception contined in section 56(2)(x) shall also apply. Donation to any trust or foreign NGO not registered under section 12A or section 12AA will accordingly be taxable
- Clause (b) requires property to be situated in India. LRS regulation permit resident Individual to hold following assets outside India:
  - Purchase of property
  - Investment in nature of shares, debt instrument, ESOP, investment in units of mutual funds, VCF, unrated debt securities, promissory notes, loan to NRI relatives
- Thus, gift of property or shares, debt instrument etc of foreign company is outside tax net

# Gift between resident and non resident

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- Clause (b) makes reference to word 'transferred'. Issue arises on connotation of term 'transferred'. Whether word 'transferred' is same as word 'transfer'. In case of gift there is no 'transfer' in sense of section 2(47). As against that, other allied laws considers gift as transfer
- Transaction between NR to NR not covered. Can it be suggested that gift of Indian company shares between two non-residents are outside tax purview. Registration of shares is merely formality?
- Memorandum clarifies 'in a treaty situation, the relevant article of applicable DTAA shall continue to apply for such gifts as well'
- Gift taxation is not dealt by any specific Article of treaty and accordingly will be covered by 'Other Income'

# Gift between resident and non resident

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## India – USA DTAA (Article 23 – Other Income)

“1. Subject to the provisions of paragraph 2, items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing Articles of this Convention shall be taxable only in that Contracting State.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6 [Income from Immovable Property (Real Property)], if the beneficial owner of the income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the income is attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 15 (Independent Personal Services), as the case may be, shall apply.

3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing articles of this Convention and arising in the other Contracting State may also be taxed in that other State.

Under Article 23(3), India has taxing rights only if income is ‘arising in the other Contracting State’. Issue arises whether term ‘arising in the other Contracting State’ also includes income ‘deem to accrue or arise’?



# Gift between resident and non resident

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## India – UAE DTAA (Article 23 – Other Income)

- “1. Subject to the provisions of paragraph (2), items of income of a **resident** of a Contracting State, **wherever arising**, which are not expressly dealt with in the foregoing articles of this Agreement, shall be taxable **only in that Contracting State**.
- 2. The provisions of paragraph (1) shall not apply to income, other than income from immovable property as defined in paragraph (2) of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

India does not have right to tax

# International Financial Service Centre

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# Boost to IFC

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## **Income of units located in IFSC**

- Capital Gains exemption available to IFSC units on transfer of bonds, derivatives, rupee denominated bonds, Global Depository Receipts extended to cover other securities as may be notified
- Also, capital gains exemption on above transfer of assets is now also available to Category III AIF, located in IFSC and which is completely held by non-residents
- Tax holiday extended for IFSC units to 100% of income in any 10 years out of block of 15 years from registration date, at the option of the assessee

## **Payment by units located in IFSC**

- No DDT payable on dividend declared by unit in IFSC either out of its current income or accumulated income
- No DDT payable by mutual fund set up in IFSC with all non-resident unit holders and deriving income only in convertible foreign exchange
- Interest payment to non-resident by IFSC unit in respect of monies borrowed after 1 September 2019 is exempt from tax

# Actions against Black Money

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# Cashless Economy

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## **Section 194N – TDS on cash withdrawals**

- Every registered bank, co-operative society carrying on banking business and post office to deduct TDS at the rate of 2% on cash withdrawn in excess of Rs. 1 crore per year per account

## **Electronic Payment mode – Necessary amendments**

- Necessary amendments made in various sections like 40A, 43, 43CA, 44AD, 50C, 80JJAA, 269SS, 269T to allow for payment through prescribed electronic modes

## **Section 269SU – Electronic facility to be provided by certain persons**

- Every person carrying on business, if his turnover or gross receipts exceeds Rs. 50 crore in immediately preceding previous year shall provide electronic facility for accepting payment
- Necessary amendment made in Payment and Settlements Act, 2007 to provide that no bank or system provider will charge for using electronic facility prescribed above
- Penalty of Rs. 5000 per day for failure to comply with above provisions

# Recovery of Tax

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## Section: 228A

- Existing provisions provide for recovery of taxes from / to foreign country with which India has entered into an agreement as under:
  - Taxes due to foreign country from a person who has property located in India;
  - Taxes due to India from a person who has property located in foreign country
- As existing provisions were restricted to property located in India / foreign country, there were impediment in practical application of said provisions
- Finance Bill now provides that recovery of tax proceedings could be initiated even in case where details of property located in India / foreign country is not available but person is resident of India / foreign country

# Black Money Act - Amendment

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## Amendment in applicability

- Existing Section 2 of Black Money Act provides that assessee means person resident in India as per section 6 of Income tax Act, 1961
- Finance Bill now proposes to expand the above definition to provide that assessee will include person not ordinarily resident as well as non-resident if they were resident in India at the time of acquisition of undisclosed foreign asset
- Further, section 72(c) of Black Money Act provides that where overseas asset is acquired before commencement of Act and no declaration is made, it will be deemed to have been acquired in the year of notice issued by AO
- It is also now clarified that year of acquisition of such undisclosed foreign asset will be determined without giving effect to above provision under section 72(c)
- Unintended consequence: Mr. A, a non-resident since birth has received undisclosed foreign asset of his resident father, Mr. B. In such a case, proceedings under Black Money Act can be initiated even against Mr. A as he is in possession of undisclosed foreign asset which was not acquired but not disclosed when Mr. B was resident in India

Start-ups

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# Start-ups

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## Relaxation of conditions for carry forward and set off of losses on change in shareholding:

- Currently, start-ups are allowed to carry forward losses only on continuity of all original shareholders
- It is proposed to allow carry forward of losses on satisfaction of either of the two conditions:
  - Continuity of 51% of voting power **OR**
  - Continuity of all original shareholders in the year of loss as well as year of set off irrespective of their shareholding percentage and such loss is incurred within 7 years of incorporation

## Exemption from capital gain on sale of residential property for investing in startup or MSME:

- Sun set date for transfer of residential property extended to 31 March 2021;
- Minimum shareholding of original promoters to be maintained for claiming exemption reduced to 25% from 50%.
- Lock in period for holding computer or computer software reduced to 3 years from existing 5 years

# Start-ups

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## **Exemption from Section 56(2)(viib) Angel Tax to Category-II AIFs:**

- Consideration received in excess of FMV, from venture capital company or a venture capital fund including Category-I AIFs, is not subject to tax in hands of company under section 56(2)(viiia)
- Proposed to extend above exemption to Category-II AIFs
- With regards to concerns of start-ups on levy of above taxes, Finance Minister stated that special administrative arrangements will be made by CBDT for pending assessments of start-ups and redressal of their grievances.
- Also, going forward, any levy of such tax will be initiated only after approval of supervisor tax officer
- No specific amendments made in the Finance Bill and one will have to wait for executive announcements

# Start-ups

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## **Non compliance with conditions under section 56(2)(viib):**

- Existing provisions provide that this section will not be applicable if company receiving consideration for issuance of shares is in compliance with prescribed conditions
- It is now proposed to provide that if prescribed conditions are not fulfilled, consideration exceeding face value of shares will be taxable as income in year of failure of those conditions
- Thus, even though section provides that amount received in excess of FMV is taxable as income, amended proviso expands the scope of section to prescribe that amount received in excess of face value of shares will be taxable as income



NBFCs

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# NBFCs – Benefits extended

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## **Section 43B – Interest deduction on actual payment**

- Existing provisions provide that interest payable to banks and other financial institutions would be allowed as deduction only in the year of payment
- The above provision extended to cover deposit taking NBFCs and Systemically important non-deposit taking NBFCs as well
- Hence, interest payment on loan obtained from NBFCs would be allowed as deduction only in year of payment

## **Section 43D – Taxability of interest income of NBFCs**

- Existing provisions provide that interest income on bad & doubtful assets for banks and other specified financial institutions is taxable in accordance with RBI regulations and in earlier of year of receipt or year of amount credited to P&L A/c
- Above provision extended to cover deposit taking NBFCs and Systemically important non-deposit taking NBFCs
- Hence, interest income for above NBFCs would be taxable in accordance with RBI regulations and in earlier of year of receipt or year of credit to P&L A/c

# NBFCs – Amendments in RBI Act

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## **Section 45-IA of RBI Act, 1934 – Increase in net owned funds**

- Existing provisions provide that NBFCs shall have minimum net owned funds of Rs 25 lacs or such amount not exceeding Rs 200 lacs as may be notified
- Finance Bill has increased threshold limit which can be notified to not exceeding Rs. 100 crores for net owned funds
- Also RBI has now been given power to provide for different amounts of net owned funds for different categories of NBFCs

## **Additional powers to RBI**

- RBI has now been given to remove director of NBFC / supersede board of any NBFC subject to fulfilment of certain conditions
- RBI has also been given power to order for amalgamation / restructuring of any NBFC, power to submit financial statements of group companies of NBFCs, inspection of books of accounts of NBFC

# Miscellaneous Provisions

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# TDS by individual and HUF

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- No liability on an individual or HUF to deduct TDS on payment made to resident contractor or professional when it is for personal use
- Memorandum mentions this as loophole leaving possibility for tax evasion
- Section 194M provides for deduction of tax at 5% on payment of any sum to any resident for carrying out any work (including supply of labour for carrying out any work)
- Payment can be in any form (includes cheque, cash, draft or any other mode)
- No TDS if aggregate sum credit or paid to resident in financial year does not exceed 50 L
  - Payment in different financial year less than 50L or payment more than 50L by various family members to same recipient not covered



# TDS by individual and HUF

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- Interestingly, work is defined to include catering and accordingly payment on marriage or personal gathering now subject to TDS
- Professional services includes architectural and medical payment. Read literally, hospital bill above 50 L will mandate TDS
- Section linked to payment and not period of availment of service. Accordingly any payment after 1 September 2019 will attract TDS irrespective of time of service
- Difficulty likely to arise when payment is composite i.e. for service as also material as contract definition includes sub-contract

(clause 46)

# TDS on purchase of immovable property

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- Consideration for immovable property defined to include all charges of the nature of club membership fee, car parking fee, electricity or water facility fee, maintenance fee, advance fee or any other charges of similar which are incidental to transfer of immovable property
- Provisions applicable from 1 September 2019
- Issue arises on applicability of provision in case of payment on instalment basis for building under construction
- Section 194-IA is applicable on payment of consideration for 'transfer' of immovable property. Accordingly, if transfer happened prior to 1 September 2019 provision should not apply. This is supported by the fact that provision applies at the time of payment of sum or credit to account of payee whichever is earlier. For property purchased prior to 1 September 2019 liability to developer would have already been recognised

(clause 45)

# Mandatory filing of return

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- Mandatory for following persons to file ROI
  - Deposits amount exceeding Rs 1 crs in one or more current bank account r
    - Not required to file ROI if amount is deposited in saving bank account?
  - Incurs expenditure exceeding Rs 2 lakh for himself or any other person for travel to a foreign country
    - Person incurring expenditure needs to file ROI and not person benefitted by expenditure
  - Incurs expenditure exceeding Rs 1 lakh towards consumption of electricity
- Person availing benefit under section 54,54B, 54D, 54EC, 54F, 54G, 54GA and 54GB. Even if income chargeable to tax does not exceed specified threshold
- Judiciary has taken lenient view and granted deduction if bonafide reason for not filing return within due date is demonstrated:
  - Dhir Global Industria (P.) Ltd [2011] 43 SOT 640 (Delhi)
  - Rajendra Pal Verma [2019] 104 taxmann.com 303 (Mumbai - Trib.)
  - Symbiosis Pharmaceuticals (P.) Ltd. [2017] 87 taxmann.com 32 (Chandigarh - Trib.)
  - V.N. Devadoss [2013] 32 taxmann.com 133 (Chennai - Trib.)

# PAN and Aadhaar

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- FM in Budget speech proposed issuance of Aadhaar Card to NRI after their arrival in India without waiting for 180 days.
- Section 139(5E) inserted to provide that any person who is required to furnish or intimate or quote his PAN under the Act and who does not have PAN but possesses Aadhaar number may furnish or intimate or quote his Aadhaar number in lieu of his PAN
- FM in Budget speech stated 'PAN and Aadhaar interchangeable and allow those who do not have PAN to file Income Tax returns by simply quoting their Aadhaar number and also use it wherever they are required to quote PAN'
- No parallel amendment in section 206AA but because of overriding nature of section 139E and intent of legislature it may be possible to take a view that higher withholding should not apply if NR has Aadhaar Card
  - Practical difficulty may arise as TDS return form needs to be amended

# Miscellaneous Provisions

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## **Section 276CCC – Prosecution – Increase in limit**

- Prosecution proceedings can be initiated only if outstanding tax is more than Rs. 10,000
- Also while determining outstanding tax, credit for prepaid taxes, self assessment taxes, advance taxes also to be given

## **Section 285BA – Furnishing statement of Financial transaction – Removal of limit**

- Earlier, reporting of specified financial transaction was mandatory only when the aggregate value of transactions exceed Rs. 50,000.
- The said limit has now removed, hence going forward all the specified financial transaction needs to be reported irrespective of amount involved.
- Scope of persons who have to report such specified financial transaction has been enhanced by including any other person as may be prescribed

# Miscellaneous Provisions

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## **Section 271FAA – Penalty for furnishing inaccurate statement of specified financial transaction**

- Penalty of Rs. 50,000 is leviable in case of furnishing of inaccurate information by any person as referred to in section 285BA.

## **Claim of Refund**

- It is now proposed that refund can be claimed only through filing return of income under section 139 of the Act

## **Pass through of losses for Category – I and Category – II AIF**

- It is now proposed to provide pass through of losses from AIF level to investor level as under:
  - Business loss – Restricted at Fund level;
  - Loss other than business loss – Pass through to investor level (if investor is holding units for more than 12 months)
  - Loss other than business loss – Accumulated at fund level as on 31 March 2019 shall be pass through to investor level

# Miscellaneous Provisions

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## **Section 80EEB – Deduction of interest paid on loan used for purchase of electric vehicle**

- Individual eligible to claim deduction for interest paid on loan utilised for purchase of electric vehicle
- Loan can be obtained from bank or specified NBFC or any other specified banking institution
- Amount of deduction not to exceed Rs. 150,000 per annum
- No other deduction allowed for such interest expense under any other provisions of the Act

## **Tax exemption on interest paid to non-resident**

- Interest paid to non-resident by Indian company or business trust on issuance of rupee denominated bonds outside India as 194LC from 17 September 2018 to 31 March 2019 is exempt from income tax

# Miscellaneous Provisions

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## **Online filing of application under section 195**

- Application for withholding tax certificate from tax officer would now be filed in online mode in manner as may be prescribed

## **Exemption from determining fair market value under section 56(2)(x) and 50CA**

- CBDT now empowered to prescribe transactions which will not be covered under section 56(2)(x) and section 50CA

## **Deduction for affordable housing**

- Definition of affordable housing has been aligned with definition provided under GST Act
- Additional deduction of Rs. 150,000 available for interest paid on loan to acquire affordable house subject to fulfilment of certain conditions



*Thank You*

# Our Offices

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## MUMBAI

605, Zee Nayak, M.G. Road, Vile Parle (East),  
Mumbai – 400 057

Email : [bhaumik@bgss.co.in](mailto:bhaumik@bgss.co.in)

Mobile No: +91 98339 15583

## AHMEDABAD

604, Shiti Ratna Building, Panchwati Circle, C.G.  
Road, Ahmedabad – 380 009

Email : [saumya@bgss.co.in](mailto:saumya@bgss.co.in)

Mobile No: +91 90999 27783

