



Detailed Analysis on Corporate Tax Amendments

CA Jhankhana Thakkar

22 February 2023



Content

Section 28(iv) and Section 194R – Benefits or Perquisites

Section 43B – Payment to MSME

Section 56(2)(viib) – Scope widened to include “Non-Residents”

Section 55 – Cost of improvement/acquisition of intangible asset shall be NIL

Section 10AA related provisions

Presumptive Taxation Regime

NBFC, IFSC and Start-ups

TDS and TCS amendments

Other Amendments

Section 28(iv) and section 194R

History of Benefits/Perquisites

Practice of providing benefits and perquisites to business connections and stakeholders

- Employers provide to its employees
- Business houses providing to its customers, suppliers and other important connections in the supply chain
- Traditionally payment was made in cash or partly in cash and partly in kind.
- Section 28(iv) is in vogue since 1964, hence interpretation received on the words contained in section 28(iv) will be of relevance.
- Controversy was on Non-reporting of the receipt of benefits in the return of income by the recipient, leading to furnishing of incorrect particulars of income
- Both provisions section 28(iv) and section 194R are couched in an identical language.

Finance Bill

- Memorandum to Finance Bill 2023 provides that cash benefits and perquisites shall fall within the ambit of aforesaid provisions overruling the SC decision of Mahindra & Mahindra Ltd [2018] 404 ITR 1 wherein it was held that words 'whether convertible into money or not' does not cover benefit or perquisite in cash

- Extract from Memorandum

*"This provision was inserted through the Finance Act 1964 and the Circular no 20D dated 7th July 1964 issued to explain the provisions of this Act stated clearly that the benefit could be in cash or in kind. **Therefore, the intention of the legislation while introducing this provision was also to include benefit or perquisite whether in cash or in kind.** However, Courts have interpreted that if the benefit or perquisite are in cash, it is not covered within the scope of this clause of section 28 of the Act.*

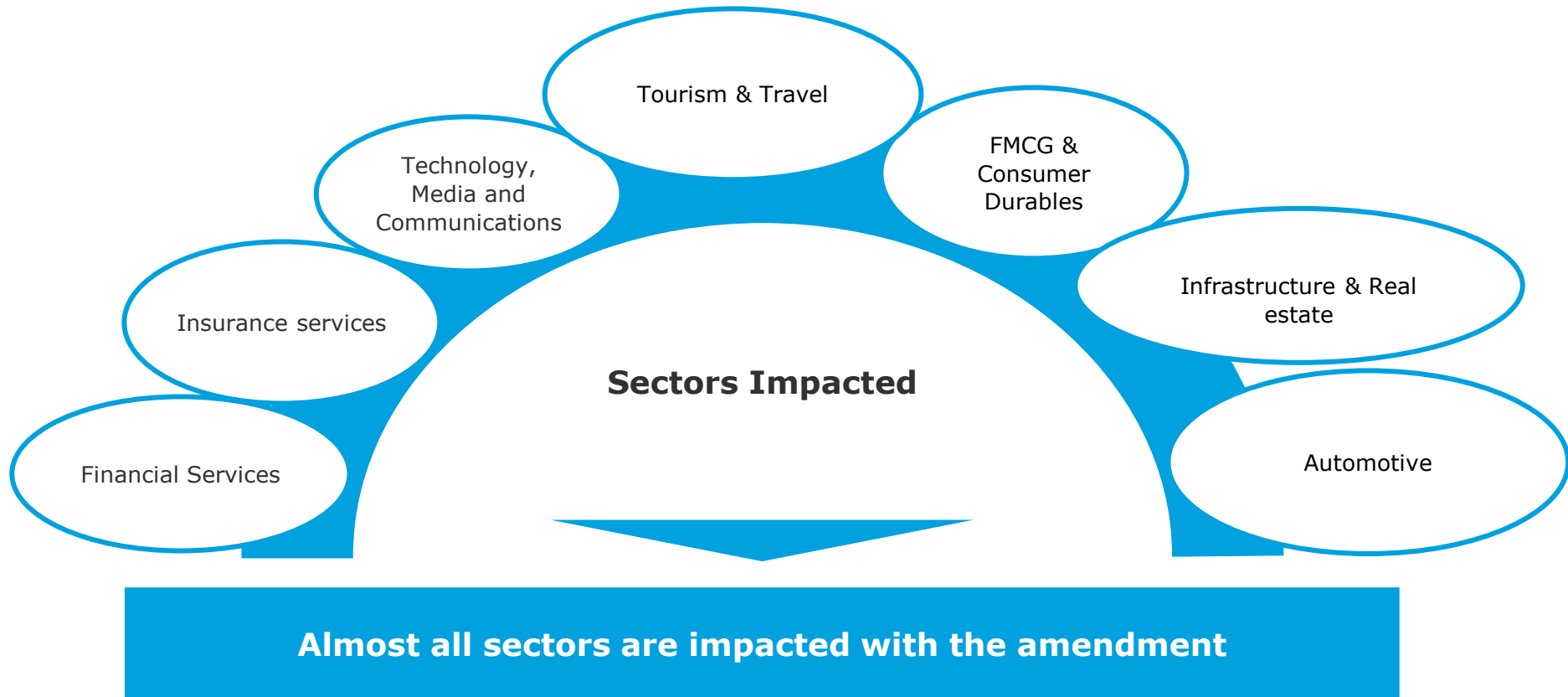
In order to align the provision with the intention of legislature, it is proposed to amend clause (iv) of section 28 of the Act to clarify that provisions of said clause also applies to cases where benefit or perquisite provided is in cash or in kind or partly in cash and partly in kind"

- The amended provisions in Section 28(iv) is effective from 1 April 2024 i.e., AY 2024-25 vis-à-vis Section 194R effective from 1 April 2023 i.e., AY 2023-24

Points to Ponder

- Waiver of Loan
- Assignment of Loan
- Bad debts
- Reward points
- Prepaid Card or Gift Voucher
- Mementos/Gifts

Impact in Industry



Issues

Issue 1

- DEF Ltd provides two types of coupons to its customers. One type of coupon is where the customer gets an instant discount on items purchase from DEF and second type of coupon is where the customer can use such coupons on a later purchase from DEF and get the discount on the purchased item.
- Coupon value will be reduced from sales value and net sales shall be reported by DEF in financial statement
- Points to Ponder:

I. For Instant discounts offered

The circular dated 16 June 2022 gives clarity on applicability of section 194R of the Act on discounts/coupons offered to customers and buy one get one scheme.

As per circular it has been clarified that the section 194R of the Act will not apply to the sales discount/cash discount and rebates provided to customers.

Based on above, in respect of sales discount and/or cash discounts and rebates offered by DEF to its customers, the provisions of section 194R of the Act could not get attracted.

II. For coupons offered

It could be contended that in respect of coupons the provision of section 194R should not be applicable

III. Buy one get one free scheme

It could be contended that the provision of section 194R should not be applicable

Issue 2

- Whether any benefit in kind given to Director will be subject to TDS under section 194R?
- Section 194J(1)(ba) specifically covers any remuneration or fees or Commission by whatever name called, other than on which is tax deductible under Section 192, to a director of the Company, however as per the decision of Mumbai Tribunal in the case of *Red Chillis Entertainment Vs ACIT (May 2016)* provision of Section 194J doesn't apply on payment made in kind.
- Section 194R provides for withholding tax obligation on any person responsible for providing to a resident, 'any benefit or perquisite', whether 'convertible into money or not', arising 'from business or the exercise of a profession', by such resident, at the rate of 10% subject to prescribed conditions. Based on section 194R(1), the benefit or perquisite should arise from business or exercise of a profession by a resident assessee
- **Points to Ponder**
 - I. Whether directors are undertaking any business or are exercising any profession ?
 - Business is defined in section 2(13) to include 'any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture'
 - The term 'profession' is not defined under section 194R, we will have to refer to the definition under Section 2(36) which is wider and could be interpreted to mean any profession or vocation. The ambit of the term's 'profession' in terms of section 194R may be considered as very wide.

Issue 3

- Whether following marketing incentives covered within the ambit of section 194R
 1. Marketing Promotional inputs and print items (may or may not include product information items or booklet)
 2. Marketing schemes – Gift card/Value Discount card (depending on scheme and target achieved) or free products
 3. Export incentives to Non-resident
 4. Product Samples – (Not meant for sold nor it is meant for self consumption)
 5. Free Products

Issue 4

1. Free goods ultimately to be supplied to end customer (an actual beneficiary) through ABC channel
2. Free goods are meant to be for dealer (ABC's customer).
3. Source of goods can be different (purchased from third party specifically for free distribution OR given from our inventories
4. Free goods given from ABC inventories under CSR activities like given to some NGO for free distribution to kids for education purpose.
5. Buy more get more offer – Bundle Offer
6. Dealer meet and conferences
7. Goodies given during or after the conferences

Other Issues

1. Other laws implications
2. Tax audit reporting
3. Disallowances
4. Penalties/Prosecutions
5. Interest

Section 43B – Payment to MSME

Section 43B amendment

- Section 43B of the Income-tax Act, 1961 pertains to the deductions that are deemed to have been made in certain circumstances.
- The provisions of this section ensure that taxpayers do not claim deductions for amounts that are payable but have not been paid, and provide for a deemed deduction in certain cases
- An amendment has been made to section 43B in clause (h) to include the sum payable by assessee to micro or small enterprise beyond the time limit specified in section 15 of MSME Act
- Section 15 of the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006 pertains to the Payment to Micro and Small Enterprises. According to this section, every buyer who buys any goods or receives any services from a micro or small enterprise, shall make payment to such enterprise for such goods or services within 45 days from the day of acceptance of such goods or services or the day of deemed acceptance.
- Benefit of claiming deduction, if payment is made on or before the due date of filing the tax return not available for such payments.
- The aforesaid proposed amendment is applicable from AY 2024-25 (FY 2023-24), hence the same is not applicable for delayed payment to MSME for AY 2023-24 (FY 2022-23).
- There is no permanent disallowance, however deduction of such payments shifted to other year.
- Interest payable to MSME is not allowed as deduction [Section 23 of MSMED Act]
- Interplay with TDS provision (the same need to be looked upon)

Section 43B – Illustration

Due date as per MSME Act	Date of Payment	Year of deduction	Comments
1 August 2023	31 March 2024	FY 2023-24	<ul style="list-style-type: none"> - Allowable in the year of payment i.e., FY 2023-24 - Thus, the amendment has no impact for delay where payment is made in same FY
1 February 2024	1 June 2024	FY 2024-25	<ul style="list-style-type: none"> - Section 43B first proviso is not applicable - Even though payment before due date, deduction shall be allowed in year of payment
1 February 2024	28 February 2025	FY 2024-25	Allowable in FY 2024-25 (year of payment)
12 March 2023	15 May 2024	FY 2022-23	Payment accrued in AY 2023-24, hence as discussed earlier the proposed amendment is not applicable for delayed payment for AY 2023-24

Section 56(2)(viib) – Taxation of share premium from Non- Resident

Section 56(2)(viib) amendment

- Section 56(2)(viib) was introduced through Finance Act, 2012 to tax a company on share premium received from resident on issue of shares in excess of FMV of the shares. Finance Bill, 2023 now proposes to expand the ambit of the section to include share premium received from non-resident in excess of FMV of the shares.
- The aforesaid proposed amendment will make the provision applicable for receipt of consideration for issue of shares from any person irrespective of his residency status.
- The proposed amendment has overruled the decision of Hon'ble Mumbai Tribunal in case of Raw Pressery Private Ltd v ACIT (2022) 220 TTJ 0026 wherein it was held that section 56(2)(viib) r.w.s 2(24)(xvi) of the Act shall not be applicable to the shares issued to ***non-residents mainly to encourage foreign investments***
- The aforesaid amendment shall be applicable from AY 2024-25 onwards.

Section 56(2)(viib) amendment

- **Interplay with FEMA with respect to consideration vis-à-vis FMV i.e.**
 - FEMA 2019 rules prohibits a company to issue shares at less than FMV computed as per an internationally accepted method
 - Finance Bill 2023 proposes to tax consideration above FMV under section 56(2)(viib)
 - There is no tolerance limit for FMV – neither in FEMA nor under TAX provisions
- **Interplay with section 68**
 - Section 68 read with section 115BBE prescribes an abrupt rate of 60% (plus cess surcharge) in case of unexplained cash credit i.e., share application
 - Resident shareholder are required to provide the source of source of investment; however, Non-Resident shareholder are required to provide explanation about its source and not beyond.

Points to Ponder

- Impact on Convertible instruments
- Valuation Issue
- Non-Discrimination – Relying on Article 24(5) of OECD Model Convention which prevents ownership-based discrimination

"Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected"

Also, reliance can be placed on the decision of Daimler Chrysler India (P.) Ltd v DCIT [2009] 29 SOT 202 (Pune) even though in the context of section 79 to contend that provision of section 56(2)(viib) should not apply to the Indian subsidiary of an overseas listed company.

Section 55 – Cost of
improvement/acquisition of
intangible asset shall be NIL

Section 55 – Cost of improvement/acquisition of intangible asset shall be NIL

- Existing provisions of section 55 of the Act, does not clearly defined “Nil” as cost of acquisition of certain assets like intangible assets or any sort of right for which no consideration has been paid for acquisition which led to prolonged litigation and was not found favour with the Courts.
- Finance Bill 2023 inserted intangible asset, right as a separate type in section 55 and deemed its cost as NIL to clarify the position and lacuna under the Law
- Amendment applicable prospectively from 1 April 2024 i.e., AY 2024-25, thus past transfers are not impacted

Section 10AA – Tax Holiday Exemption in case of SEZ units

Section 10AA – Tax Holiday Exemptions in case of SEZ Units

Proposed additional conditions in Finance Bill 2023 to claim deduction under section 10AA from FY 2023-23

- Tax holiday provisions to apply to SEZ units only if the proceeds are received/brought into India in convertible foreign exchange, within six months from the end of the FY (or within such period as a competent authority viz. RBI, may allow).
- AO would be able to amend the assessment order at a later date when the export earning is realised in India after the permitted period.
- No deduction shall be allowed unless the return of income is furnished by the specified due date.

**Impact of settlement of exports in INR ??
(Circular dated 11 July 2022 issued by RBI permitting
international trade settlement in INR)**

Presumptive Taxation Regime

Presumptive taxation regime schemes

- **Rationalisation of Presumptive taxation regime schemes i.e. Increase in threshold limits for presumptive taxation – Section 44AD and 44ADA**
 - Turnover/gross receipts threshold limit for availing the presumptive taxation schemes increased as under:
 - ❖ For eligible business under the Section 44AD (business other than the business of plying, hiring or leasing goods carriages) from INR 2 crores to INR 3 crores
 - ❖ For eligible professionals under the Section 44ADA from INR 50 lakhs to INR 75 lakhs
 - The amount or aggregate of the amount received during the previous year, in cash, should not exceed 5 percent of the total turnover or gross receipts
 - The receipt by a cheque drawn on a bank or by a bank draft, which is not account payee, to be deemed to be receipt in cash
 - Tax audit report exempted for such taxpayers
- **Preventing misuse of presumptive schemes under section 44BB and section 44BBB**
 - No set-off of unabsorbed depreciation and brought forward loss to be allowed in the year when income from business is offered to tax on presumptive basis by specified NR taxpayers i.e. *Specified NR taxpayers engaged in business of providing services or facilities in connection with or supplying plant and machinery on hire to be used in the prospecting for/ extraction/ production of mineral oil and engaged in business of civil construction etc. in certain turnkey power projects*

NBFC, IFSC and Start-ups

NBFC, Incentives to IFSC units and Start-ups

- **NBFC**

- Provisions of thin-capitalisation rules (limitation on interest deduction) in respect of debt issued by a NR, being an AE of taxpayer not to apply to notified NBFCs
- Existing provisions for allowability of deduction of interest on actual payment to NBFC and taxability of interest income in relation to certain bad and doubtful debts of NBFC to apply to such class of NBFCs, which would be notified by the CG

- **Incentives to IFSC - Tax exemption extended for fund located in IFSC**

- The timeline for availing exemption on transfer of assets of the original fund or its wholly owned special purpose vehicle to a resultant fund in case of relocation to be extended from 31 March 2023 to 31 March 2025.
- Consequently, timeline for exemption to shareholder/unit holder/interest holder of the original fund for transfer of share/unit/interest to be extended until 31 March 2025.
- Exemption proposed to be extended to NR on distribution of income on ODI entered with OBU of an IFSC, provided such income is chargeable to tax in the hands of the OBU.

- **Start-ups –**

- **Extension of incorporation date for eligible start-ups to avail tax holiday to be extended until 31 March 2024**

- The date of incorporation for eligible start-ups to avail tax holiday to be extended until 31 March 2024

- **Relief in carrying forward and set-off of losses**

- Relaxation provided to eligible start-ups for carrying forward and set-off of losses even upon change in shareholding, is extended from 7 years to 10 years

TDS and TCS amendments

TDS Amendments

TDS credit for income disclosed in income returns of the past years

- Where the taxpayer has included a particular income in the return for a year and TDS on such income has been deducted and paid in a subsequent year, then the taxpayer can claim credit for such TDS in a prescribed manner.
- The amendment is proposed to be effective from 1 October 2023.

TDS on interest on listed dematerialised securities introduced

- Existing exemption from TDS on interest payable to resident taxpayer on specified security issued by a company, which is in dematerialised form and listed on a recognised stock exchange in India withdrawn

TDS on payment of specified income to NR: DTAA relief – section 196A

- TDS on payment to NR of income on units of specified mutual funds or specified company, to be at lower of following rates:
 - 20 percent or
 - Applicable rate as per DTAA, subject to furnishing of TRC

Certificate for TDS at lower or Nil rate – Section 197

- Nil/lower TDS certificate can be obtained in case of specified income distributed/payable by business trust to its unitholder

Relief from TDS/TCS at higher rates for certain non filers of income-tax returns

- Relief from TDS/TCS at higher rates for specified person who are not required to furnish return of income for specified period and notified by CG

TCS Amendments

TCS on certain foreign remittances and on sale of overseas tour packages

- With effect from 1 July 2023, the TCS rates to be amended as follows:
 - Remittance for certain education and medical treatment: Nil for remittance less than INR 7 lacs and 5 percent for amount exceeding INR 7 lacs
 - TCS increased from 5 percent to 20 percent in case of sale of overseas tour programme package and other LRS remittances

Other Amendments

Other Amendments

- **Taxation of capital gains on market-linked debentures**

Capital gains on transfer or redemption or maturity of market-linked debentures will be deemed to be short-term capital gains.

In computing capital gains, no deduction to be allowed in respect of any STT paid.

- **Sale consideration on the transfer of land/building under JDA**

Full value of the consideration to include the consideration received in cash, cheque, draft, or any other mode.

- **Lapsing of losses in case of change in shareholding of closely held start-ups**

Provision triggering the lapse of losses in case of change in shareholding will not apply to closely held start-ups up to 10 years from the date of incorporation, if the shareholding of the founders remains intact.

The amendment is proposed to be effective from FY23.

- **Carry forward of losses and unabsorbed depreciation in case of strategic disinvestment**

Definition of "strategic disinvestment" amended to also include the following:

- Sale of shareholding by public-sector companies
- Sale of shareholding in any company, resulting in the following:
 - Reduction of shareholding of the Government or public-sector company to under 51 percent; and
 - Transfer of control to the buyer
- Carry forward of losses is also permitted in case of amalgamation of a banking company with any other banking institution or company within five years of strategic disinvestment

These amendments are proposed to be effective from FY23.

TDS and tax on winnings from online games and others

Tax on winnings from online games

- Specific provisions have been introduced to tax net winnings from online games at 30 percent with effect from FY2023-24.
- Online games have been defined to mean a game that is offered on the internet and is accessible by a user through a computer resource, including any telecommunication device.
- The method of computation of net winnings from online games is to be prescribed. Further, terms such as computer resource and internet have been defined.
- Such winnings from online games have been excluded from existing provisions relating to the taxation of winnings from lotteries, crossword puzzles, card games, and others.

TDS on net winnings from online games

- Net winnings from online games to be subjected to TDS at the rates in force (currently 30 percent) from 1 July 2023 as follows:
 - On withdrawal from user account during the FY (on the net winnings comprised in such withdrawal)
 - On the net winnings in the user account/remaining in the user account at the end of the FY (to be computed in a prescribed manner); and
- Manner of computing net winnings in the user account to be prescribed.
- Where net winnings are wholly or partly in kind and, cash is insufficient to cover TDS liability, the payer should ensure that the payee has paid tax before releasing the winnings.
 - Terms such as online gaming intermediary, user, user account, etc., have been defined.

Rationalisation of TDS provisions for winnings from lotteries, crosswords, horse races, etc.

- A threshold of INR 10,000 (during an FY) to apply on an aggregate basis for TDS on winnings from lotteries, crossword, and other games.
- A similar aggregate TDS threshold of INR 10,000 (during an FY) to apply for TDS on winnings from horse races.
- TDS provisions of lottery, crossword puzzles, etc., have been amended to include winnings from “gambling or betting of any form or nature whatsoever”.
- These amendments are proposed to be effective from 1 April 2023.
- It is proposed that winnings from online gaming be excluded from the ambit of TDS on lottery, crosswords, etc., with effect from 1 July 2023.

Other Amendments

Clarification on interest computation for defaults in the payment of advance tax in case of updated returns

- It has been clarified that the interest (for default in payment of advance tax) shall be computed on the assessed tax after reducing the advance tax claimed in earlier returns, if any.
- This amendment will take effect retrospectively from 1 April 2022.

Rationalising provisions for withholding refunds and setting-off of refunds against tax payable

- To remove any existing overlaps, provisions relating to withholding of refund (in case refund is likely to adversely affect revenue) and set-off of refund against tax payable have been merged.

Sunset for exemption of news agencies – section 10(22B)

- Exemption available to news agencies to be withdrawn from FY2023-24.

Procedural Aspects

Timeline to file return pursuant to its reassessment notice

- The return in relation to the reassessment proceedings will be furnished within three months from the end of the month in which the reopening notice is issued, or within the time extended by the AO.

Issuance of reassessment notice pursuant to search-and-seizure proceedings

- In case of search, etc., initiated after 15 March of any FY, where the period for the issue of notice under section 148 expires on 31 March of such FY, a period of 15 days shall be excluded for computing period of limitation for the issuance of such notice and the notice so issued will be deemed to have been issued on 31 March of such FY.

Undervaluation of inventory

To ensure that the inventory is valued in accordance with the law, the following amendments have been proposed:

- Enabling the AO to direct the taxpayer to get the inventory valued by a cost accountant, nominated by a relevant tax authority
- Expenses relating to inventory valuation to be determined by relevant tax authorities in accordance with guidelines, and to be paid by the Central Government
- Taxpayers will be given an opportunity to be heard, except in case of best judgement assessment

Penalty and prosecution for failure to pay or ensure payment of tax

- Penalty introduced for failure to pay or ensure payment of the whole or any part of the tax, but the part in cash is not sufficient to meet the TDS liability on:
 - Provision of benefit or perquisite in respect of business or profession,
 - Transfer of virtual digital asset
 - Winning from any online game (effective 1 July 2023)
- Prosecution provisions are proposed for the aforesaid failure to pay the tax or ensure payment of tax/TDS

Procedural Aspects

Introduction of a new appellate authority, viz JCIT(A)

- A new appellate authority, viz JCIT(A) has been introduced, to handle a certain class of cases involving small amount of disputes

Re-alignment of timelines for completion of tax assessments

- It is proposed to provide that the assessments for and from the assessment year commencing 1 April 2022, shall be completed within a period of 12 months from the end of the assessment year; assessment proceedings in case of an updated return shall also be completed within a period of 12 months from the end of the financial year in which the updated return is furnished
- Clarifications to be inserted for timelines to complete assessment in cases post revision and for completion of assessment/re-assessment in search cases

Rationalisation of appeals to ITAT

- Appeal against the following orders enabled to be made to the ITAT
 - Penalty orders passed under the Section 271AAB, 271AAC, and 271AAD by CIT(A)
 - Order passed by PCCIT or CCIT under the Section 263
- Filing of cross-objections provided for all classes of cases

Penalty for furnishing inaccurate SFT or reportable account

- If the inaccuracy in the SFT (Specified Financial Transaction submitted by a prescribed RFI (Reporting Financial Institution) is due to false or inaccurate information submitted by the account holder, a penalty of INR 5,000 (in addition to the existing penalty of INR 0.05 million) is proposed to be imposed on such RFI for every inaccurate reportable account
- The RFI is entitled to recover/retain the amount so paid on behalf of the account holder

Procedural Aspects

Amortisation of preliminary expenditure

- The taxpayer is required to furnish a statement containing the particulars of expenditure in connection with the following (within a prescribed period to income-tax authority and in prescribed form and manner):
 - Preparation of feasibility report or the project report or conducting of market survey or of any other survey or engineering services

Decriminalisation of the Section 276A

- Prosecution on the liquidator (who fails to give notice to the AO entitled to assess the income of company within 30 days of appointment; or fails to set aside the amount or part with any of the company assets or properties in his hands in contravention of the provision) not to be initiated on or after 1 April 2023

Strengthen search and seizure provisions

- Provisions related to search and seizure to be rationalised to *inter-alia* provide for assistance to the authorised officer during and after the search

Questions



“The only place where success comes before work is in the dictionary”.

Thank You



The information contained in this document is intended to provide general information on a particular subject or subjects and are not exhaustive treatment of such subject(s).

The contents of this document are for general information and the presenter by means of this document is not rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This document is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your finances or your business. Before making any decision or taking any action that may affect your finances or business, you should consult a qualified professional advisor.

The presenter shall not be responsible for any loss whatsoever sustained by any person who relies on this document.

