DISCUSSION PAPER

ON

FINANCE BILL 2018

FROM THE DESK OF:

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a) Prefatory remarks

When it is seen in the light of prevalent taxation landscape under direct taxes specially on touchstone of the events occurring after demonetization and the challenges faced in last one year by taxpaying population, it was anxiously felt that some attention and solution would be given to issues like significance to **objections** disposal by Assessing Officer/ competent authority, strict adherence to **principle of natural justice** specially when investigation wing related information is used *in carte blanhe* manner, some accountability on part of assessing officers where seriously **high pitched assessments** are made despite direct and clear cut rulings in tax payer's favor and where **CBDT instructions** are openly flouted, difficulty in applying section 56 like share premium , sense of **judicial discipline** being ingeminated, valuation of shares etc, wider prosecutions being redacted (that income tax is not meant to prosecute the tax payers but to collect the taxes on income), searches and surveys being regulated in wake of their exponential usage, respect to **national litigation policy** , better and judicious disposal of stay petitions etc. This wish list could be much longer but fact remains that this wish list remained wish list only. It is apt to quote here immortal words of **Roscoe Pound** as appearing in his celebrated treaties,

The Ideal Element in Law, that *“the law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change.”* In is another matter that Hon’ble Apex Court in its recent decision in case of **Ms Era vs Govt of NCT of Delhi** (CRIMINAL APPEAL NOS.12171219 OF 2017, 21 July, 2017) has eloquently observed in judgment delivered by His lordship Hon’ble Justice R.F.Nariman that

“*13. The Indian Income Tax Act, 1960 has also been the subject matter of judicial criticism. Often, amendment follows upon amendment making the numbering and the meaning of its sections and sub-sections both bizarre and unintelligible. One such criticism by Hegde, J. in Commissioner of Income Tax v. Distributor (Baroda) (P) Ltd., (1972) 4 SCC 353, reads as follows: “We have now to see what exactly in the meaning of the expression “in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments” in the main Section 23-A and the expression “in the case of a company whose business consist wholly or mainly in the dealing in or holding of investments” in clause (i) of Explanation 2 to Section 23-A. The Act contains many mind-twisting formulas but Section 23-A along with some other sections takes the place of pride amongst them. Section 109 of the 1961 Income Tax Act which has*

taken the place of old Section 23-A of the Act is more understandable and less abstruse. But in these appeals we are left with Section 23-A of the Act." (Para 15)

14. All this reminds one of the old British ditty:

"I'm the Parliament's draftsman, I compose the country's laws,
And of half the litigation I'm undoubtedly the cause!""

In the same judgment , his lordship has also highlighted that :

"24. It is thus clear on a reading of English, U.S., Australian and our own Supreme Court judgments that the 'Lakshman Rekha' has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of Heydon, where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in Heydon's case, which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid 1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in Heydon's case." "Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual".

Further relevant are remarks made by Hon'ble Kerala High Court in case relating to income tax (**Kanan Devan Hills Plantations Company Pvt. Ltd. Vs ACIT,** ITA.No. 48 of 2015, 16/11/2017) has recently observed as under:

"A linguistic Aside:

17. The Income Tax Act is one enactment that can shatter anybody's linguistic confidence or competence. Each provision— inevitably, though— runs into pages, superordinate, subordinate, and sub-subordinate clauses piling up in syntactic curlicues. With annual addition, the provisions lose coherence and defy comprehension. Neither a lawyer nor a Judge can claim with comfort, if not with confidence, that he could comprehend the provision at least on a rereading; the taxpayer is surely lost in in a maze of meandering phrases.

It is therefore time for the Revenue to host on their website a plain English version of the enactment—only a suggestion, however.

18. Even the native speakers of the language—notably the USA and the UK—have re-drafted, and have been re-drafting, the bulk of their legislation in plain language. In the USA, the Federal and the State Governments apart, the Uniform Law Commission, "a non-profit organisation of volunteers promoting uniformity of laws throughout the United States", has drafted in legal-linguistic experts like Bryan A Garner and Joseph Kimble for this purpose."

Above exposition would make it clear that lot of things which have been expected may be addressed in Finance Bill 2018 unfortunately have not been met. On the contrary , recent standard procedure from CBDT on section 68

cash credits circulated through out country dated 10/01/2018 , which selectively discusses case laws favoring revenue may not be in accordance with objective and unbiased approach. Further reinforcement of ICDS by overruling the effect of Hon'ble Delhi high Court decision in case of Chamber of Tax Consultants Vs Union of India reported in 400 ITR 178 may be viewed as obdurate and obstinacy as decision of Hon'ble Delhi high court only highlighted age old well settled concepts of prudence, real income and concept of accrual of income which may still be challenged as *arbitrary* vide article 14 of our holy Indian constitution. It is another matter that use of word "accountability" in new section 143(3A) dealing with e-assessments is rightly understood and taken to logical ends. Further tendency to interpret legal changes with retrospective manner *dehors* legislative setting has been dealt by Hon'ble Apex court in case of ESSAR TELEHOLDINGS LTD order dated 31/01/2018 wherein it is held that

"it is a settled principle of statutory construction that every statute is prima facie prospective unless it is expressly or by necessary implications made to have retrospective operations. Legal Maxim "nova constitutio futuris formam imponere debet non praeteritis", i.e. 'a new law ought to regulate what is to follow, not the past', contain a principle of presumption of prospectively of a statute."

With these prefatory remarks, analysis of key selective changes proposed in Finance Bill 2018 concerning Direct Taxes, is made in next section of this paper.

b) Analysis of changes

i) Deemed dividend u/s 2(22)(e) brought under section 115O

When following words in memorandum explaining Finance Bill 2018 are recited "The taxability of deemed dividend in the hands of recipient has posed serious problem of the collection of the tax liability and has also been the subject matter of extensive litigation. With a view to bringing clarity and certainty in the taxation of deemed dividend…" and therefore "..in order to prevent camouflaging dividend in various ways such as loans and advances" changes are made in section 115O (Income Tax Act/Act) that : deemed dividend u/s 2(22)(e) shall be taxable under dividend distribution taxes at higher rate of 30% . It would be worth watching as to how this change is practically enforced and assessed, given the fact that there may lot of disputed points between revenue and assessee as to what is deemed dividend u/s 2(22)(e) of the Act. Once this tax is paid on stated deemed dividend u/s 2(22)(e) in hands of payer company if it is later discovered that there is no such dividend an assessee may have to face huge practical difficulty in getting refund of taxes wringfully paid u/s 115O . Advisably one ruling

of Gujarat high court in case of Torrent Pvt Limited decided on 15 January, 2013 may be worth noting where in it is inter-alia held that *" Neither of these two provisions or anything else contained in section 115O of the Act, in our opinion, would change the position. In the present case, we are concerned with a situation under which after certain dividend was declared and tax thereon was actually paid, by virtue of the High Court sanctioning the amalgamation scheme, which took effect from a date anterior to the declaration of the dividend would change the very character of such payment and such payment ceased to enjoy the character of dividend. In that view of the matter, the petitioner was perfectly justified in seeking refund of the tax already paid. We may recall that in the return filed, the petitioner had filed a detailed note explaining such position. Claiming refund, a separate application was also filed which unfortunately came to be rejected by the Assessing Officer. The Assessing Officer contended that there was no provision under which such refund can be claimed. Section 237 of the Act, however, provides that if any person satisfies the Assessing Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under the Act for that year, he shall be entitled to a refund of the*

excess amount. The case of the petitioner would, thus, be clearly covered under the said statutory provisions." The provision of section 2(22)(e) is itself moving like a revolving chair when readers attention goes to recent Hon'ble Apex court verdict in case of National Travel Services (C.A. No.-002068-002071 / 2012, 18/01/2018) wherein the issue relating to applicability of section 2(22)(e) to shareholder (whether beneficial share holder or registered share holder) has been referred to larger bench with following observation *". This is why "shareholder" now, post amendment, has only to be a person who is the beneficial owner of shares. One cannot be a registered owner and beneficial owner in the sense of a beneficiary of a trust or otherwise at the same time. It is clear therefore that the moment there is a shareholder, who need not necessarily be a member of the Company on its register, who is the beneficial owner of shares, the Section gets attracted without more. To state, therefore, that two conditions have to be satisfied, namely, that the shareholder must first be a registered shareholder and thereafter, also be a beneficial owner is not only mutually contradictory but is plainly incorrect"* . This interpretation if approved as such may work like teaser in amended section 115O.

Effective date : 1/4/2018

ii) Charitable Trust taxation related proposals

In Section 10(23C) and section 11, changes have been made with following recitals in memorandum explaining Finance Bill 2018 that *"**At present, there are no restrictions on payments made in cash by charitable or religious trusts or institutions. There are also no checks on whether such trusts or institutions follow the provisions of deduction of tax at source under Chapter XVII-B of the Act. This has led to lack of an audit trail for verification of application of income**. In order to encourage a less cash economy and to reduce the generation and circulation of black money, it is proposed to insert a new Explanation to the section 11 to provide that for the purposes of determining the application of income under the provisions of sub-section (1) of the said section, the provisions of sub-clause (ia) of clause (a) of section 40, and of sub-sections (3) and (3A) of section 40A, shall, mutatis mutandis, apply as they apply in computing the income chargeable under the head "Profits and gains of business or profession". It is also proposed to insert a similar proviso in clause (23C) of section 10 so as to provide similar restriction as above on the entities exempt under sub-clauses (iv), (v), (vi) or (via) of said clause in respect of*

application of income.” That is it is now explanation 3 is added in section 11 by stating that “Explanation 3.—For the purposes of determining the amount of application under clause (a) or clause (b), the provisions of sub-clause (ia) of clause (a) of section 40 and sub-sections (3) and (3A) of section 40A, shall, mutatis mutandis, apply as they apply in computing the income chargeable under the head “Profits and gains of business or profession”. That is, while determining amount which is required to be applied to charitable purposes due effect shall be given to section 40(a)(ia) (30% disallowance of expense on which tax was deductible and not deducted) and restriction on cash expenses read with Rule 6DD , by making suitable adjustments in computation of income. This is prospectively applicable from AY 2019-2020 and so any prior adjustment made in past on now suggested line by revenue should get its automatic burial. The difficulty in appreciating this amendment is ostensible contradiction in basic approach which is required to be followed in making assessments of charitable trusts u/s 11 etc. The selected introduction of provisions of business head in section 11 computation is opening of a different gateway which can lead in future to more such provisions being applied to charitable trusts.

iii) Taxability of compensation in business head and other sources

Suggested change in this regard is encapsulated in section 28 and section 56 which resonates that " in section 28(ii) as "(e) *any person, by whatever name called, at or in connection with the termination or the modification of the terms and conditions, of any contract relating to his business;"*; ,in section 56(2) as*"(xi) any compensation or other payment, due to or received by any person, by whatever name called , in connection with the termination of his employment or the modification of the terms and conditions relating thereto."* The underlying intent behind this change as given in memorandum to finance bill states *"a large segment of compensation receipts in connection with business and employment is out of the purview of taxation leading to base erosion and revenue loss."* The general concept of compensation when properly understood as the term 'Compensation' has been explained in R.Ramanatha Aiyar law dictionary refering to Blacks Law dictionary as: *"An act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or*

injury to another in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury; remuneration or satisfaction for injury or damage of every description; remuneration for loss of time, necessary expenditures and for permanent disability if such be the result; remuneration for the injury directly and proximately caused by a breach of contract or duty; remuneration or wages given to an employee or officer.", may not be rightly viewed as leading to any stated base erosion and revenue loss. It is still not known as to under legislative scheme /policy of the income tax statute, it is really intended there that compensations are taxed *like income* for generation of revenue. It is luculent from language used that compensation taxability in given circumstance is suggested in two heads limitedly that is business head and other sources only. That is similar compensation given in relation to transfer of capital asset may not be taxable specially when such compensation is given for mental agony etc. Like compensation given in RERA to flat buyers may continue to be treated like capital receipt non chargeable to tax (refer CIT Vs. Saurashtra Cement, 192 Taxmann 300 (SC) / 2010] 325 ITR 422 (SC)**, concept of Sterilization of the profit-earning source etc).**The words of Ahmedabad ITAT in Urvi Seth vs ITO (31.05.2016) *"Section 56 does not decide what is*

an income. What it holds is that if there is an income, which is not taxable under any of the heads under Section 14, i.e item A to E, it is taxable under the head 'income from other sources'. The receipt being in the nature of income is a condition precedent for Section 56 coming into play, and not vice versa. To suggest that since an item is listed under section 56(2), even without there being anything to show that it is of income nature, it can be brought to tax is like putting the cart before the horse. The very approach of the authorities below is devoid of legally sustainable merits. The authorities below were thus completely in error in bringing the interest awarded by Hon'ble Supreme Court to tax. The question of deduction under section 57(iii), given the above conclusion, is wholly irrelevant" are apposite here. Further, in business head it is stated that compensation may be for any contract relating to business (its termination or modification covered).That is when there is neither any modification nor any termination of a contract of business, taxation under new provisions may not be attracted like liquidated damages given under the contract or damages awarded by court under a law. Similarly , section 56 change be interpreted vis a vis employment termination or its modification. These changes are prospectively made from AY 2019-2020.

iv) Conversion of stock to investment – taxation regime specified:

With the objective that "In order to provide symmetrical treatment and discourage the practice of deferring the tax payment by converting the inventory into capital asset" changes are made in section 28, 2(24), 49, 2(42A) by stipulating that "“(via) the fair market value of inventory as on the date on which it is converted into, or treated as, a capital asset determined in the prescribed manner" will be taxable in section 28 as *business income*, with related and consequential changes made in other provisions. That is , such fair market value shall be deemed adopted cost u/s 49 and period of holding u/s 2(42A) under capital gains head shall be reckoned from date of conversion/treatment**. Effective date: Prospectively applicable from AY 2019-2020**

v) **Section 44AE goods carriage income**: In the case of heavy goods vehicle (more than 12MT gross vehicle weight), the income would deemed to be an amount equal to one thousand

rupees per ton of gross vehicle weight or unladen weight, as the case may be, per month or part of a month for each goods vehicle or the amount claimed to be actually earned by the assessee, whichever is higher. The vehicles other than heavy goods vehicle will continue to be taxed as per the existing rates.

vi) **<u>Section 43CA, Section 50C and Section 56</u>** – safe harbor rule of 105% vis a vis circle rate: "It has been pointed out that this variation can occur in respect of similar properties in the same area because of a variety of factors, including shape of the plot or location. In order to minimize hardship in case of genuine transactions in the real estate sector, it is proposed to provide that no adjustments shall be made in a case where the variation between stamp duty value and the sale consideration is not more than five percent of the sale consideration." (assessment year 2019-20 and subsequent assessment years.)

vii) Section 54EC changed : "*In order to rationalise the provisions of section 54EC of the Act and to restrict the scope of the section only to capital gains arising from long-term capital assets, being land or building or both and to make available funds at the disposal of eligible bond issuing company for more than three years, it is proposed to amend the section 54EC so as*

to provide that capital gain arising from the transfer of a long-term capital asset, being land or building or both, invested in the long-term specified asset at any time within a period of six months after the date of such transfer, the capital gain shall not be charged to tax subject to certain conditions specified in this section. It is also proposed to provide that long-term specified asset, for making any investment under the section on or after the 1st day of April, 2018, shall mean any bond, redeemable after five years and issued on or after 1st day of April, 2018 by the National Highways Authority of India or by the Rural Electrification Corporation Limited or any other bond notified by the Central Government in this behalf"

viii) Section 80AC made wider:For section 80AC of the Income-tax Act, the following section shall be substituted, namely:— '*80AC. Where in computing the total income of an assessee of any previous year relevant to the assessment year commencing on or after— (i) the 1st day of April, 2006 but before the 1st day of April, 2018, any deduction is admissible under section 80-IA or section 80-IAB or section 80-IB or section 80-IC or section 80-ID or section 80-IE; (ii) the 1st day of April, 2018, any deduction is admissible under* ***any provision of this Chapter under the heading "C.—Deductions in respect of certain***

***incomes”,** no such deduction shall be allowed to him unless he furnishes a return of his income for such assessment year on or before the due date specified under sub-section (1) of section 139.’*

Section 80C , Section 80G like deduction falls in chapter heading B (Section 80C to Section 80GGC) and not C (covers Section 80H to 80TT **including 80P ,80JJAA**) therefore same are not covered here.

ix) Section 80JJAA – Employment deduction provision scope widened

"…...However, the minimum period of employment is relaxed to 150 days *(as compared to normal 240 days)* in the case of apparel industry. In order to encourage creation of new employment, it is proposed to extend this relaxation to footwear and leather industry. Further, it is also proposed to rationalize this deduction of 30% by allowing the benefit for a new employee who is employed for less than the minimum period during the first year but continues to remain employed for the minimum period in subsequent year…"

x) Long term capital gains related change in section 112A (new provision inserted)

‘112A. (1) Notwithstanding anything contained in section 112, the tax payable by an assessee on his total income shall be determined in accordance with the provisions of sub-section (2), if— (i) the total income includes any income chargeable under the head “Capital gains”; (ii) the capital gains arise from the transfer of a long-term capital asset being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust; (iii) securities transaction tax under Chapter VII of the Finance (No.2) Act, 2004 has,— (a) in a case where the long-term capital asset is in the nature of an equity share in a company, been paid on acquisition and transfer of such capital asset; or (b) in a case where the long-term capital asset is in the nature of a unit of an equity oriented fund or a unit of a business trust, been paid on transfer of such capital asset.
(2) The tax payable by the assessee on the total income referred to in sub-section (1) shall be the aggregate of— (i) the amount of income-tax calculated on such long-term capital gains exceeding one lakh rupees at the rate of ten per cent.; and (ii) the amount of income-tax payable on the balance amount of the total income as if such balance amount were the total income of the assessee: Provided that in the case of an individual or a Hindu undivided family, being a resident, where the total income as reduced by such long-term capital gains is below the maximum amount which is not chargeable to income-tax, then, the long-term capital gains, for the purposes of clause (i), shall be reduced by the amount by which the total income as so reduced falls short of the maximum amount which

is not chargeable to income-tax. (3) The condition specified in clause (iii) of sub-section (1) shall not apply to a transfer undertaken on a recognised stock exchange located in any International Financial Services Centre and where the consideration for such transfer is received or receivable in foreign currency. (4) The Central Government may, by notification in the Official Gazette, specify the nature of acquisition in respect of which the provisions of sub-clause (a) of clause (iii) of sub-section (1) shall not apply. (5) The capital gains under sub-section (1) shall be computed without giving effect to the provisions of the first and second provisos to section 48. (6) The cost of acquisition for the purposes of computing capital gains referred to in sub-section (1) in respect of the long-term capital asset acquired by the assessee before the 1st day of February, 2018, shall be deemed to be the higher of— (i) the actual cost of acquisition of such asset; and (ii) the lower of— (a) the fair market value of such asset; and (b) the full value of consideration received or accruing as a result of the transfer of the capital asset. (7)Where the gross total income of an assessee includes any long-term capital gains referred to in sub-section (1), the deduction under Chapter VI-A shall be allowed from the gross total income as reduced by such capital gains. (8) Where the total income of an assessee includes any long-term capital gains referred to in sub-section (1), the rebate under section 87A shall be allowed from the income-tax on the total income as reduced by tax payable on such capital gains. Explanation.—For the purposes of this section,— (a) "equity oriented fund" means a fund set up under a scheme of a mutual fund specified under clause (23D) of section 10 and,— (i) in a case where the fund invests in the units of another fund which is traded on a

recognised stock exchange,— (A) a minimum of ninety per cent. of the total proceeds of such fund is invested in the units of such other fund; and (B) such other fund also invests a minimum of ninety per cent. of its total proceeds in the equity shares of domestic companies listed on a recognised stock exchange; and (ii) in any other case, a minimum of sixty-five per cent. of the total proceeds of such fund is invested in the equity shares of domestic companies listed on a recognised stock exchange: Provided that the percentage of equity shareholding or unit held in respect of the fund, as the case may be, shall be computed with reference to the annual average of the monthly averages of the opening and closing figures; (b) "fair market value" means,— (i) in a case where the capital asset is listed on any recognised stock exchange, the highest price of the capital asset quoted on such exchange on the 31st day of January, 2018: Provided that where there is no trading in such asset on such exchange on 31st day of January, 2018, the highest price of such asset on such exchange on a date immediately preceding the 31st day of January, 2018 when such asset was traded on such exchange shall be the fair market value; (ii) in a case where the capital asset is a unit and is not listed on a recognised stock exchange, the net asset value of such asset as on the 31st day of January, 2018; (c) "International Financial Services Centre" shall have the meaning assigned to it in clause (q) of section 2 of the Special Economic Zones Act, 2005; (d) "recognised stock exchange" shall have the meaning assigned to it in clause (ii) of Explanation 1 to clause (5) of section 43.'."

xi) Section 115BBE anomaly plugged: "Sub-section (2) of said section provides that no deduction in respect of any expenditure or allowance or set-off of any loss shall be allowed to the assessee under any provision of the Act in computing his income referred to in clause (a) of sub-section (1). In order to rationalize the provisions of section 115BBE, it is proposed to amend the said sub-section (2) so as to also include income referred to in clause (b) of sub-section (1)."

xii) Insolvency law related changes – MAT , Section 79 loss carry forward and Section 140 return verification etc

"In computing the book profit , it provides, inter alia, for a deduction in respect of the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account. Consequently, where the loss brought forward or unabsorbed depreciation is Nil, no deduction is allowed. This non-deduction is a barrier to rehabilitating companies seeking insolvency resolution….. In view of the above, it is proposed to amend section 115JB to provide that the aggregate amount of unabsorbed depreciation and loss brought forward (excluding unabsorbed depreciation) shall be allowed to be reduced from the book profit, if a company's application for corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 has been admitted by the Adjudicating Authority.,, This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent assessment years" This amendment will take effect from 1st April, 2018 and will,

accordingly, apply in relation to the assessment year 2018-19 and subsequent assessment years

Section 79*: "Provided also that nothing contained in this section shall apply to a company where a change in the shareholding takes place in a previous year pursuant to a resolution plan approved under the Insolvency and Bankruptcy Code, 2016, after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner.".*

Section 140: "It is also proposed to amend section 140 of the Act so as to provide that during the resolution process under the Insolvency and Bankruptcy Code, 2016, the return shall be verified by an insolvency professional appointed by the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016."

xiii) PAN Wider Coverage

In section 139A after clause (iv), the following clauses shall be inserted, namely:— "(v) not being an individual, which enters into a financial transaction of an amount aggregating to two lakh fifty thousand rupees or more in a financial year; or (vi) who is the managing director, director, partner, trustee, author, founder, karta, chief executive fficer, principal officer or office bearer of the person referred to in clause (v) or any person competent to act on behalf of the person referred to in clause (v),".

xiv) Section 143(1) processing rationalized

"Sub-section (1) of the section 143 provides for processing of return of income made under section 139, or in response to a notice under sub-section (1) of section 142. Clause (a) of the said sub-section provides that at the time of processing of return, the total income or loss shall be computed after making the adjustments specified in sub-clauses (i) to (vi) thereof. 16 Sub-clause (vi) of the said clause provides for adjustment in respect of addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return. With a view to restrict the scope of adjustments, it is proposed to insert a new proviso to the said clause to provide that no adjustment under sub-clause (vi) of the said clause shall be made in respect of any return furnished on or after the assessment year commencing on the first day of April, 2018. This amendment will take effect from lst April, 2018 and will, accordingly, apply in relation to the assessment years 2018-2019 and subsequent years."

xv) Section 143(3A) & (3B)- E assessment – launched in act

Section 143….after sub-section (3), the following sub-sections shall be inserted, namely:— "(3A) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of making assessment of total income or loss of the assessee under sub-section (3) so as to impart greater ***efficiency, transparency and accountability*** *by— (a) eliminating the interface between the Assessing Officer and the assessee in the course of proceedings* ***to the extent technologically feasible;*** *(b) optimising utilisation of the resources through economies of scale and functional specialisation; (c)* ***introducing a team-based assessment with dynamic jurisdiction….*** **3B) The Central Government may, for the purpose of giving effect to the scheme made under sub-section (3A), by notification in the Official Gazette, direct that any of the provisions of this Act relating to assessment of total income or loss shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification: Provided that no direction shall be issued after the 31st day of March 2020"**

xvi) Prosecution on companies u/s 276CC

In order to prevent abuse of the said proviso by shell companies or by companies holding Benami properties, it is proposed to amend the provisions of the said sub-clause (The sub-clause (b) of clause (ii) of proviso to the section 276CC

further provides that a person shall not be proceeded against under the said section for failure to furnish return for any assessment year commencing on or after the 1st day of April, 1975, if the tax payable by him on the total income determined on regular assessment as reduced by the advance tax, if any, paid and any tax deducted at source, does not exceed three thousand rupees.)) so as to provide that the said sub-clause shall not apply in respect of a company.

xvii) Cross border transaction: International taxation related changes (Excerpts from Memorandum explaining Finance Bill 2018)

"The oranges upon the trees in California are not acquired wealth until they are picked, not even at that stage until they are packed, and not even at that stage until they are transported to the place where demand exists and until they are put where the consumer can use them. These stages, upto the point where wealth reached fruition, may be shared in by different territorial authorities." (excerpts from a report on double taxation submitted to League of Nations in early 1920s) Accordingly, both the residence and source countries claim the right to taxation.

The scope of existing provisions of clause (i) of sub-section (1)

of section 9 is restrictive as it essentially provides for physical presence based nexus rule for taxation of business income of the non-resident in India. Explanation 2 to the said section which defines ‘business connection’ is also narrow in its scope since it limits the taxability of certain activities or transactions of non-resident to those carried out through a dependent agent. Therefore, emerging business models such as digitized businesses, which do not require physical presence of itself or any agent in India, is not covered within the scope of clause (i) of sub-section (1) of section 9 of the Act. In view of the above, it is proposed to amend clause (i) of sub-section (1) of section 9 of the Act to provide that'significant economic presence' in India shall also constitute 'business connection'. Further, “significant economic presence” for this purpose ,shall mean(i) any transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India if the aggregate of payments arising from such transaction or transactions during the previous year exceeds the amount as may be prescribed; or (ii) systematic and continuous soliciting of its business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means. It is further proposed to provide that only so much of income as is attributable to such

transactions or activities shall be deemed to accrue or arise in India. It is further proposed to provide that the transactions or activities shall constitute significant economic presence in India, whether or not the non-resident has a residence or place of business in India or renders services in India. The proposed amendment in the domestic law will enable India to negotiate for inclusion of the new nexus rule in the form of 'significant economic presence' in the Double Taxation Avoidance Agreements. It may be clarified that the aforesaid conditions stated above are mutually exclusive. The threshold of “revenue” and the “users” in India will be decided after consultation with the stakeholders. Further, it is also clarified that unless corresponding modifications to PE rules are made in the DTAAs, the cross border business profits will continue to be taxed as per the existing treaty rules.

Further, with a view to preventing base erosion and profit shifting, the recommendations under BEPS Action Plan 7 have now been included in Article 12 of Multilateral Convention to Implement Tax Treaty Related Measures (herein referred to as ‘MLI’), to which India is also a signatory. Consequently, these provisions will automatically modify India’s bilateral tax treaties covered by MLI, where treaty partner has also opted for

Article 12. As a result , the DAPE provisions in Article 5(5) of India’s tax treaties, as modified by MLI, shall become wider in scope than the current provisions in Explanation 2 to section 9(1)(i). Similarly, the antifragmentation rule introduced as per paragraph 4.1 of Article 5 of the OECD Model Tax Conventions, 2017 has narrowed the scope of the exception under Article 5(4), thereby expanding the scope of PE in DTAA vis-a-vis domestic provisions contained in Explanation 2 to section 9(1)(i). In effect, the relevant provisions in the DTAAs are wider in scope than the domestic law. However, sub-section (2) of section 90 of the Act provides that the provisions of the domestic law would prevail over corresponding provisions in the DTAAs, to the extent they are beneficial. Since, in the instant situations, the provisions of the domestic law being narrower in scope are more beneficial than the provisions in the DTAAs, as modified by MLI, such wider provisions in the DTAAs are ineffective. In view of the above, it is proposed to amend the provision of section 9 of the Act so as to align them with the provisions in the DTAA as modified by MLI so as to make the provisions in the treaty effective. Accordingly, clause (i) of sub-section (1) of section 9 is being proposed to be amended to provide that “ business connection” shall also include any business activities carried through a person who,

acting on behalf of the non-resident, habitually concludes contracts or habitually plays the principal role leading to conclusion of contracts by the non-resident . It is further proposed that the contracts should be (i) in the name of the non-resident; or (ii) for the transfer of the ownership of, or for the granting of the right to use, property owned by that non-resident or that the non-resident has the right to use; or (iii) for the provision of services by that non-resident. This amendment will take effect from 1st April, 2019 and will, accordingly, apply in relation to assessment year 2019-20 and subsequent assessment years.

A clarificatory amendment is also proposed in section 115JB of the Act to provide that the provisions of section 115JB of the Act shall not be applicable and shall be deemed never to have been applicable to an assessee, being a foreign company, if- its total income comprises solely of profits and gains from business referred to in section 44B or section 44BB or section 44BBA or section 44BBB and such income has been offered to tax at the rates specified in the said sections. This amendment will take effect, retrospectively from 1st April, 2001 and will, accordingly, apply in relation to the assessment year 2001-02 and subsequent assessment years.

Given the business exigencies of the National Technical Research Organisation (NTRO), it is proposed to amend section 10 so as to provide that the income arising to non-resident, not being a company, or a foreign company, by way of royalty from, or fees for technical services rendered in or outside India to, the NTRO will be exempt from income tax. Consequently, NTRO will not be required to deduct tax at source on such payments. This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to assessment year 2018-19 and subsequent assessment years\

xviii) ICDS – Reinforced by various legislative changes (refer in light of Delhi high court decision in case of 400 ITR 178 Supra Chamber case)

"In order to bring certainty in the wake of recent judicial pronouncements on the issue of applicability of ICDS, it is proposed to — (i) amend section 36 of the Act to provide that marked to market loss or other expected loss as computed in the manner provided in income computation and disclosure standards notified under sub-section (2) of section 145, shall be allowed deduction. (ii) amend 40A of the Act to provide that no deduction or allowance in respect of marked to market loss or

other expected loss shall be allowed except as allowable under newly inserted clause (xviii) of sub-section(1) of section 36. (iii) insert a new section 43AA in the Act to provide that, subject to the provisions of section 43A, any gain or loss arising on account of effects of changes in foreign exchange rates in respect of specified foreign currency transactions shall be treated as income or loss, which shall be computed in the manner provided in ICDS as notified under sub-section (2) of section 145. (iv) insert a new section 43CB in the Act to provide that profits arising from a construction contract or a contract for providing services shall be determined on the basis of percentage of completion method except for certain service contracts, and that the contract revenue shall include retention money, and contract cost shall not be reduced by incidental interest, dividend and capital gains. (v) amend section 145A of the Act to provide that, for the purpose of determining the income chargeable under the head "Profits and gains of business or profession,— (a) the valuation of inventory shall be made at lower of actual cost or net realizable value computed in the manner provided in income computation and disclosure standards notified under (2) of section 145. (b) the valuation of purchase and sale of goods or services and of inventory shall be adjusted to include the amount of any tax, duty, cess or fee

actually paid or incurred by the assessee to bring the goods or services to the place of its location and condition as on the date of valuation. (c) inventory being securities not listed, or listed but not quoted, on a recognised stock exchange, shall be valued at actual cost initially recognised in the manner provided in income computation and disclosure standards notified under (2) of section 145. (d) inventory being listed securities, shall be valued at lower of actual cost or net realisable value in the manner provided in income computation and disclosure standards notified under (2) of section 145 and for this purpose the comparison of actual cost and net realisable value shall be done category-wise. (vi) insert a new section 145B in the Act to provide thata. interest received by an assessee on compensation or on enhanced compensation, shall be deemed to be the income of the year in which it is received. b. the claim for escalation of price in a contract or export incentives shall be deemed to be the income of the previous year in which reasonable certainty of its realisation is achieved. c. income referred to in sub-clause (xviii) of clause (24) of section 2 shall be deemed to be the income of the previous year in which it is received, if not charged to income tax for any earlier previous year. Recent judicial pronouncements have raised doubts on the legitimacy of the notified ICDS. However, a large number of taxpayers have

already complied with the provisions of ICDS for computing income for assessment year 2017-18. In order to regularise the compliance with the notified ICDS by a large number taxpayers so as to prevent any further inconvenience to them, it is proposed to bring the amendments retrospectively with effect from 1st April, 2017 i,e the date on which the ICDS was made effective and will, accordingly, apply in relation to assessment year 2017-18 and subsequent assessment years."

c) Conclusion of the paper

From aforesaid sojourn of selected changes proposed in Finance Bill 2018 concerning Direct taxes, few key take away which emerges are:

i) Government is going to be tough on prosecutions specially shell companies and benami properties holding companies;
ii) Deemed dividend section 2(22)(e) may be more strictly enforced u/s 115O;
iii) ICDS needs to strictly followed and concepts of prudence and real income and income accrual takes the back seat;
iv) Business and employment related stated compensation needs to offered for taxation;
v) Cross border taxation – *expanded* concept of business connection needs to be strategically understood and captured in analyzing tax exposures and taking tax positions
vi) E- assessments are future;
vii) Return filing deadline for **chapter C** deduction like 80JJAA etc needs to be complied carefully;
viii) Charitable trust needs to follow TDS discipline and cash expenditure rule u/s 40(a) & Section 40A(3) etc
ix) Conversion of stock to investment needs to be seen carefully given new tax regime for it;

x) Section 54EC bonds restricted benefit for land and building needs to suitably factored in capital gains planning with extended blockage of funds;

xi) PAN coverage has been widened;

In all complexity of provisions under Income Tax Act may get more confounded with given changes as more and more explanations and provisos which are added would be more difficult to fathom.