INDIAN TAXATION

The following is a summary of certain relevant provisions of the Income-tax Act, 1961 ("**ITA**"), the Income-tax Rules, 1962 ("**the Rules**"), the Finance Act, 2022, various circulars and notifications issued thereunder from time to time and the provisions of the Double Tax Avoidance Agreement ("**DTAA**"). This summary is not intended to constitute a complete analysis of the Indian income-tax implications as applicable and does not constitute legal, professional or tax advice. The relevant tax provisions are subject to change. This section has been prepared to give an overview of the expected Indian income-tax implications in connection with the income accruing to each Fund since each Fund is a Category I Foreign Portfolio Investor ("**FPI**") registered in India. This summary is prepared on the basis that each Fund will qualify as a separate taxable person under the ITA and will be regarded as a company for the purposes of the ITA. However, there is a risk that the Indian tax authorities may take a view that each Fund, being a sub-fund of the ICAV (including any future sub-funds of the ICAV) is not a separate taxable person under the ITA and hence, the income earned by each Fund (including any future sub-funds of the ICAV) can be assessed at a consolidated level in the hands of the ICAV.

The tax rates specified in this section are as applicable for the Financial Year 2022-23. These rates are exclusive of surcharge and health and education cess (unless stated otherwise). The tax rates applicable pursuant to the DTAA will generally not be subject to surcharge or cess.

The rate of surcharge and health and education cess is as under:

Surcharge

Particulars	Surcharge rate as a % of income-tax		
	If income does not exceed INR 1 crore	If income exceeds INR 1 crore but less than or equal to INR 10 crores	If income exceeds INR 10 crores
Foreign Company including a Foreign Portfolio Investor ('FPI') incorporated as a company	Nil	2%	5%

Health and education cess

In addition to the above, health and education cess at the rate of 4% is leviable on aggregate of tax and surcharge.

General

The basis of charge of Indian income-tax depends upon:

(1) The residential status of the taxpayer during a tax year; and

(2) The nature of the income earned.

The Indian tax year runs from 1 April until 31 March.

A person who is an Indian tax resident is liable to taxation in India on worldwide income, subject to certain tax exemptions, which are afforded under the provisions of the ITA. A person who is treated as a non-resident for Indian income-tax purposes is generally subject to tax in India only on such person's Indian-sourced income or income received in India.

A Fund will be subject to taxation in India only if: (1) it is regarded as a tax resident of India; or (2) being a non-resident, has an Indian source of income, including income arising through a permanent establishment ("**PE**") or a business connection in India; or has received or deemed to have received income or earned income (whether accrued or otherwise) in India.

The income earned by a Fund from investments in India should generally be regarded as Indian sourced income. Such income should be taxable in India as per provisions of the ITA.

Place of Effective Management

As per provisions of the ITA, a foreign company is regarded as a tax resident in India if its place of effective management ("**POEM**") is in India in that year. POEM has been defined to mean a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.

The Central Board of Direct Taxes ("**CBDT**") has *vide* its circular No 6 of 2017 dated 24 January 2017 issued guiding principles for determination of POEM. The POEM guidelines emphasise on principle of 'substance over form' while determining POEM. As per the said guidelines, the POEM in case of foreign company engaged in active business outside India shall be presumed to be outside India, if the majority of the meetings of the board of directors (with *de facto* power of control and management with the board of directors) of such company are held outside India. For foreign companies not engaged in active business outside India, determination of POEM would be two stage process, i.e. (1) First stage would be identification or ascertaining the person or persons who actually make the key management and commercial decisions for the conduct of the company's business as a whole and (2) Second stage would be determination of place where these decisions are in fact made (rather than implemented). The POEM of the foreign company is to be determined on a year-on-year basis and is based on all relevant facts related to the management and control of the foreign company and is not to be determined on the basis of isolated facts.

Further, the CBDT issued a circular dated 23 February 2017, to clarify that the POEM provisions to determine the tax residency of a company would not be applicable to companies having turnover or gross receipts of INR 500 million or less in a financial year.

If the key management and commercial decisions that are necessary for the conduct of the activities of a Fund as a whole are, in substance made outside India, a Fund should qualify as a non-resident as per the ITA. However, considering that POEM guidelines are subjective in nature, the possibility of Indian tax authorities challenging the POEM and treating a Fund to have a POEM in India and consequently being regarded as a tax resident of India under the ITA cannot be completely ruled out. In case the POEM of a Fund is in India, global income of a Fund would become subject to tax in India as per the provisions of the ITA. The CBDT has issued a notification dated 22 June 2018, prescribing special provisions with respect to certain computational and procedural aspects of foreign companies which are regarded as residents in India on account of its POEM being in India.

Tax treaty benefits

The taxation of a non-resident is governed by the provisions of the ITA, read with the provisions of the DTAA entered into between India and the country of residence of such non-resident. As per Section 90(2) of the ITA, a non-resident would be taxable in accordance with the provisions of the ITA or the applicable DTAA (if any), whichever is more beneficial to such non-residents. This would be subject to the General Anti Avoidance Rules ("**GAAR**") which are effective from 1 April 2017. The GAAR provisions, if invoked, could result in denial of the beneficial provisions of the DTAA (for detail GAAR provisions refer discussion in paragraphs below). The benefit availed by non-residents under applicable DTAA will also be subject to provisions of the Multilateral Convention to implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("**MLI**") discussed in detail in the paragraphs below. Accordingly, availability of DTAA benefits should be a relevant factor in determining the Indian tax consequences in respect of income earned by such non-resident.

ASK INVESTMENT FUNDS ICAV is an umbrella fund in Ireland (referred to as ICAV for the purpose of this document). The investments in India will be made by the Fund (defined as a sub-fund) which will have segregated assets and liabilities as compared to other Funds under the ICAV. Considering this, the Fund is technically a sub-fund of the umbrella ICAV in Ireland and whether tax treaty benefits are available to such sub-fund is subject matter of interpretation and analysis. Having said this, w.r.t. the provisions of the

Multilateral Convention to implement Tax Treaty related measures to prevent Base Erosion And Profit Shifting (MLI) and the Convention between the Government of the Republic Of India and the Government of Ireland for the avoidance of Double Taxation and for the prevention of fiscal evasion with respect to taxes on income and capital gains, generally, the capital gains arising on sale of listed shares of an Indian company is taxable as per the provisions of the ITA.

The taxability of income of the non-resident, in the absence of DTAA benefits, would be as per the provisions of the ITA. Further, the taxability of the income of the non-resident, from a country with which India has no DTAA, would be as per the provisions of the ITA. Further, the taxability under the DTAA depends upon the provisions under the applicable DTAA to the non-resident. This tax chapter captures the tax aspects considering that the provisions of the ITA are applicable and no tax benefit under the Tax Treaty is applicable.

Tax Residency Certificate ("TRC")

Section 90(4) of the ITA provides that in order to claim DTAA benefits, the non-resident has to obtain a TRC as issued by the foreign tax authorities. Further, the non-resident should be required to furnish such other information or document as may be prescribed. In this connection, the CBDT *vide* its notification dated 1 August 2013 amended rule 21AB of the Rules prescribing certain information in Form No 10F to be produced along with the TRC, if the same does not form part of the TRC.

The details required to be furnished are as follows:

- Status (individual, company, firm, etc.) of the assessee;
- Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others);
- Assessee's tax identification number in the country or specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the government of the country or the specified territory of which the assessee claims to be a resident;
- Period for which the residential status, as mentioned in the TRC, is applicable; and
- Address of the assessee in the country or specified territory outside India, during the period for which the certificate is applicable.

The additional information prescribed above may not be required to be provided if it already forms a part of the TRC. The TRC is relevant if any person is claiming the beneficial provisions of the applicable Tax Treaty.

Tax rates applicable on various streams of income of the Fund

Basis the investment strategy of the Fund, it is currently envisaged that a Fund could earn the following streams of income from its investment in Indian investments:

(1) Gains arising on transfer of Indian investments viz. equity shares, debt securities and derivatives;
(2) Dividend income;
(3) Interest income; and

The tax implications with respect to each of the above-mentioned income streams are discussed as under:

A. Gains arising on transfer of Indian investments as mentioned above

Under the ITA:

Gains arising from the transfer of securities held in companies may be treated either as 'capital gains' or as 'business income' for tax purposes, depending upon whether such securities are held as a capital asset or trading asset (i.e., stock-in-trade). Traditionally, the issue of characterisation of gains (whether taxable as business income or capital gains) has been a subject matter of litigation with the tax authorities. There have been judicial pronouncements on whether gains from transactions in securities should be taxed as 'business profits' or as 'capital gain'. However, these pronouncements, while laying down certain guiding principles have largely been driven by the facts and circumstances of each case. Also, the CBDT has provided guidance (*vide* its Instruction No. 1827, dated 31 August 1989 and Circular No. 4/2007, dated 15 June 2007) in respect of characterisation of gains as either capital gains or business income.

The Fund intends to organize itself in a manner that it complies with the conditions and parameters mentioned in the CBDT Circular and instructions such that the income from sale of securities in the investee companies be generally categorised as capital gains. However, the possibility of the tax authorities seeking to treat such income as business income cannot be ruled out.

Having said the above, there are certain specific provisions w.r.t. the taxation of FPI in India. The definition of "**capital asset**" includes any security held by an FPI[1], which has invested in such security in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992 (15 of 1992). Accordingly, in the current case, as the Fund is registered as an FPI, a Fund's income on transfer of its Indian investments [acquired in accordance with the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019] should be regarded as capital gains.

[1] Vide Notification No. 9/2014 dated 22 January 2014, the Indian Government has extended the benefits available to Foreign Institutional Investors under section 115AD of the ITA to FPIs in India. A similar notification is yet awaited for FPIs registered in accordance with SEBI (FPI) Regulations, 2019.

Further, to mitigate tax disputes and litigation, the CBDT has vide its circular dated 29 February 2016, clarified that in respect of listed shares and securities held for a period of more than 12 months immediately preceding its date of transfer, if the taxpayer desires to treat the income arising from transfer thereof as capital gains, the same shall not be put to dispute by the tax officer. However, this stand, once taken by the taxpayer in a particular year, shall remain applicable in subsequent years also and the taxpayer shall not be allowed to adopt a different/ contrary stand in this regard in subsequent years. The CBDT also clarified that the same shall not apply in respect of the transactions where the genuineness of the transaction itself is questionable.

In the context of transfer of unlisted shares, the CBDT has issued a clarification vide Instruction No. F. No. 225/12/2016/ ITA.II dated 2 May 2016, stating that income arising from transfer of unlisted shares would be considered under the head "**capital gains**" irrespective of the period of holding with a view to avoid dispute/ litigation and to maintain uniform approach (with tax treatment on transfer of listed shares). However, the above shall not apply in the following cases:

- The genuineness of transactions in unlisted shares itself is questionable; or
- The transfer of unlisted shares is related to an issue pertaining to lifting of corporate veil; or
- The transfer of unlisted shares is made along with the control and management of underlying business and the Indian tax authorities would take appropriate view in such situations.

If the gains are characterised as capital gains

Per Section 45 of the ITA, any profits or gains arising from the transfer of capital assets are chargeable to income tax under the head 'capital gain'.

Type of instrument	Period of holding	Characterisation
Listed securities (other than a unit), Unit of equity-oriented mutual fund, units of the Unit Trust of India and Zero-Coupon Bonds.	More than 12 months	Long-Term Capital Asset
	12 months or less	Short-Term Capital Asset
Unlisted shares of a company (i.e., other than shares listed on a recognized stock exchange in India)	More than 24 months	Long-Term Capital Asset
	24 months or less	Short-Term Capital Asset
Other securities not covered above	More than 36 months	Long-Term Capital Asset
	36 months or less	Short-Term Capital Asset

The capital gains tax rates (excluding applicable surcharge and health and education cess) under the ITA are as under:

Sr. No.	Nature of Income	Tax rate in case of foreign companies
1.	Short-term capital gains earned from following transactions on which Securities Transactions Tax ("**STT**") has been paid: (a) sale of listed equity shares through the recognised stock exchange; or (b) sale of to be listed equity shares through offer for sale as part of an initial public offer; or (c) sale of units of equity oriented mutual fund.	15%
2.	Other short-term capital gains.	30% - for investment under FPI route
3.	Long-term capital gains earned from the following transactions on which STT has been paid at the time of: (a) Acquisition and sale of listed equity shares through the recognised stock exchange; or (b) sale of to be listed equity shares through offer for sale as part of an initial public offer; or (c) sale of units of equity oriented mutual fund. (Refer Note 2)	10% on gains exceeding INR 0.1 million
4.	Long-term capital gains on transfer of listed securities (other than units) on which STT has not been paid (Refer Note 3)	10%
5.	Long-term capital gains on transfer of unlisted securities (Refer Note 3 and 4)	10%

Notes:

1. As per Section 48 of the ITA, capital gains shall be computed by deducting from full value of consideration, the cost of acquisition of such securities and the expenditure incurred wholly and exclusively in connection with transfer of such securities. However, as per section 115AD of the ITA, an FPI shall not be entitled to take the benefit of first proviso (foreign currency computation) and second proviso (indexation) to section 48 of the ITA while computing capital gains arising from the transfer of securities.

2. Without foreign exchange and indexation benefits.

3. Based on judicial precedents, any non-resident, including the Fund investing under other than the FPI route, may avail the concessional tax rate of 10% with respect to gains arising from transfer of listed securities (other than units) and zero-coupon bonds. However, the possibility of Indian tax authorities disregarding the said position and applying a tax rate of 20% cannot be ruled out.

4. As per Section 48 of the ITA, capital gains shall be computed by deducting from full value of consideration, the cost of acquisition of such securities and the expenditure incurred wholly and exclusively in connection with transfer of such securities. As per the amendment in the Finance Act, 2017, in case of transfer of unlisted shares, if the consideration received is less than the fair market value ("**FMV**"), the FMV shall be deemed as the full value of consideration. FMV shall be determined in accordance with the rules prescribed by the Indian tax authorities.

5. The Finance Act, 2022, has exempted any income accrued or arisen to or received by a non-resident as a result of transfer of offshore derivative instruments or over-the-counter derivatives entered into with an Offshore Banking Unit of an IFSC, subject to fulfilment of conditions, as may be prescribed.

If the gains are characterised as business income

In case the gains of a Fund from sale of the securities held in the Indian portfolio entities is characterized as business income, such income shall be taxed at the rate of 40% on a net-income basis (subject to DTAA benefits discussed below).

Under Tax Treaty:

If the gains are characterized as capital gains

As per the Tax Treaty, capital gains arising in the hands of a Fund on account of alienation of shares of Indian portfolio companies will be chargeable to tax in India as per the tax rates prescribed under the ITA.

However, capital gains arising on account of investments in other securities including debt securities, derivatives and mutual fund units shall continue to remain exempt under the Tax Treaty (subject to other aspects discussed in this section).

If the gains are characterized as business income

In case the gains of a Fund from sale of the securities (other than investment made under the FPI route) held in the Indian portfolio entities are characterized as business income, then such income shall not be taxable in India if a Fund does not have a PE in India. If a PE were created in India, then the Fund would be taxed at the rate of 40% on its income on net basis that is attributable to such PE in India.

Bonus Stripping

The Finance Act, 2022, has amended bonus stripping provisions to cover all securities and units [including units of a Real Estate Investment Trusts (REITs), Infrastructure Investment Trusts (InvITs) and Alternative Investment Funds (AIFs)]. With amendment to this provision, any capital loss arising to the investor on account of securities acquired three months prior to the record date and transferred within nine months of the record date, is to be ignored. Such 'ignored capital loss' is to be considered as the cost of acquisition of the bonus units as on the date of transfer. In case the Fund undertakes such transactions, bonus stripping provisions could apply.

B. Dividend income

As per the ITA

As per the provision of the ITA, dividends declared, distributed or paid by Indian investee companies are taxable in the hands of the recipient at the applicable tax rates. As per the ITA amended by the Finance Act, 2021, the Indian investee company will be required to deduct taxes at source (a) at the rate of 20% under section 196D of the ITA or (b) at the rate provided under the relevant tax treaty, whichever is lower, on dividend payment made to the FPI, if the FPI has furnished a tax residency certificate.

Dividend income earned by the Fund will be subject to tax at the rate of 20% as per section 115AD of the ITA for investment made through the FPI route.

For investments made through the foreign direct investment route, the Indian investee company will be required to deduct taxes at source at 'rates in force' under section 195 of the ITA on dividend payment made to the Fund. The dividend income earned by the Fund will be subject to tax at the rate of 20% as per the provisions of section 115A of the Act for investment made through the foreign direct investment route.

As per the Tax Treaty

As per Article 10 of the Tax Treaty, any dividend income earned by the Fund from its investment in the Indian companies should be chargeable to tax at the rate of 10% provided (i) the Fund is the "**beneficial owner**" of such dividend income and (ii) the Fund does not have a PE in India as per Article 5 of the Tax Treaty or a fixed base in India and the holding in respect of which the dividends are paid is not effectively connected with such PE or fixed base.

Having said the above, it may be noted that the Fund should be first eligible to claim such benefits. As mentioned earlier, the availability and access to the provisions of the Tax Treaty requires analysis.

Dividend Stripping

The Finance Act, 2022, has amended dividend stripping provisions to cover units of REITs, InvITs and AIFs. Thus, tax-exempt dividend income received would attract dividend stripping provisions.

The Fund would primarily invest in equity shares of companies in India. The dividend income from these equity shares is taxable in the hands of the Fund and hence, the provisions of dividend stripping are not likely to be applicable to the Fund.

C. Interest income

As per the ITA

As per the ITA, interest payable to a Fund, being an FPI, on rupee denominated bonds of Indian companies and government securities would be subject to a tax at the rate of 5% if the following conditions are satisfied:

(a) Such interest is payable on or after 1 June 2013 but before 1 July 2023;
(b) In respect of rupee denominated bond, rate of interest does not exceed 500 basis points over the applicable base rate of State Bank of India as on the date of issue of bonds.

Further, any interest earned by Fund, being an FPI from investment in municipal debt securities on or after 1 April 2020 but before 1 July 2023 would also be taxed at the rate of 5%.

As per ITA, any interest arising to a Fund out of borrowings in foreign currency under loan agreements or on long-term bonds issued by Indian companies before 1 July 2023 would be subject to tax at the rate of 5%.

Further, the concessional tax rate of 5% is also extended to interest in respect of monies borrowed from a source outside India by way of rupee denominated bonds issued by an Indian company before 1 July 2023.

As per ITA, any interest arising to a Fund on long-term bonds and rupee denominated bonds which are listed only on a recognised stock exchange in any IFSC issued by Indian companies on or after 1 April 2020 but before 1 July 2023 would be subject to tax at a rate of 4%.

In case the benefit of the concessional tax rate is not available, then the interest income on securities would be subject to tax at the rate of 20% in the hands of a Fund, being an FPI. However, if the investment is made under other than FPI route, the interest income may be taxed at the rate of 40%.

As per the Tax Treaty

As per Article 11 of the Tax Treaty, any interest income earned by a Fund from its investment in the Indian companies should be chargeable to tax at the rate of 10% provided (i) the Fund is the "**beneficial owner**" of such interest income; and (ii) the Fund does not have a PE in India as per Article 5 of the Tax Treaty or a fixed base in India and the debt-claim in respect of which the interest is paid is not effectively connected with such PE or fixed base.

The tax rate of 10% under the Tax Treaty would be relevant only if the tax rate under the ITA on such interest income is higher than 10%.

Having said the above, it may be noted that the Fund should be first eligible to claim such benefits. As mentioned earlier, the availability and access to the provisions of the Tax Treaty requires analysis.

Other relevant tax considerations

Deemed income on investment in any shares/ securities of an Indian portfolio entity

As per provisions of the ITA, where any person receives any shares and securities from any person for a consideration which is lower than the FMV by more than INR 0.05 million, then difference between the FMV and consideration shall be taxable in the hands of acquirer as 'Income from other sources' ("**Other Income**"). The rules for determining the FMV of shares and securities have been prescribed in under the Rules.

As per the provisions of the Rules, the FMV of quoted shares and securities received by way of transaction carried out through any recognised stock exchange would be transaction value as recorded on such stock exchange whereas, the FMV of quoted shares and securities received by way of transaction other than through recognised stock exchange would be based on: (a) the lowest price of such shares and securities quoted on any recognised stock exchange on the valuation date (date of receipt of shares), and (b) the lowest price of such shares and securities on any recognised stock exchange on a date immediately preceding the valuation date when such shares and securities were traded on such stock exchange, in cases where on the valuation date there is no trading in such shares and securities on any recognised stock exchange.

Further, the FMV of unquoted equity shares would be based on the book values of assets and liabilities subject to certain adjustments or as determined by a merchant banker as per the discounted free cash flow method. The FMV of all other unquoted shares and securities would be based on the market value of such shares and securities on the valuation date as certified by a merchant banker or an accountant.

As per the Finance (No. 2) Act 2019, the above provision shall not apply to any consideration received/ accruing on transfer by such class of persons and subject to fulfilment of conditions as prescribed in Rule 11UAC of the Rules.

The Fund would undertake transaction in securities on recognised stock exchange in India and hence the deemed income provision ought not to apply for investments made under the FPI route. For investment made under the foreign direct investment route, if it is held that a Fund has earned such 'Other Income', such other income would be chargeable to tax at the rate of 40%.

Provisions related to overseas transfer/ indirect transfer

As per provisions of the ITA, capital gains on income arising from the transfer of shares or interest in a foreign company or entity registered outside India shall be taxable in India (subject to availability of Tax Treaty benefits, if available), if the shares or interest, directly or indirectly, derive their value substantially from assets located in India. The shares or interest shall be deemed to derive substantial value from the assets located in India, if on the specified date, the value of Indian assets–

(i) exceeds INR 100 million; and
(ii) represents at least 50% of the value of all the assets owned by the foreign company.

The capital gains will be taxable in India only to the extent that they are attributable to the Indian assets. The valuation rules have been prescribed in this regard.

Exemption to small shareholders - Overseas transfer provisions are not applicable where the transferor (individually or along with its associated enterprises) does not hold the right of management or control and has less than 5% of the voting power/ share capital/ interest in the offshore entity.

The ITA, clarifies that the scope of the overseas transfer tax provisions shall not cover within their ambit, direct or indirect investments held by non-resident investors in FPIs that are registered as Category I FPI or Category II FPI with Securities Exchange Board of India ("**SEBI**") under the SEBI (Foreign Portfolio Investors) Regulations, 2014 (SEBI FPI Regulations, 2014). However, in view of the new FPI regulations announced in September 2019 (in supersession of the SEBI FPI Regulations, 2014), the Finance Act, 2020 amended the overseas transfer provisions to provide that the exemption from these provisions should be applicable upon transfer of investments in Category I FPIs under the SEBI (Foreign Portfolio Investors) Regulations, 2019. Further, investments in Category I and Category II FPIs made under the SEBI FPI Regulations, 2014 prior to their repeal (i.e., 23 September 2019) shall continue to be exempt.

Thus, transfer or redemption of shares held by the investors directly or indirectly in Category I FPIs will not be subject to any tax/ withholding tax in India.

Deduction of tax at source

Section 194Q in the ITA provides that any person (i.e. buyer) who is responsible for paying any sum to any resident (i.e. seller) for the purchase of any goods (likely to include shares and securities) of the value or aggregate of such value exceeding INR 50 lakhs in any previous year, shall deduct an amount equal to 0.1%. of such sum exceeding INR 50 lakhs. The buyer shall be required deduct such tax at the time of credit of such sum to the account of the seller or at the time of payment thereof by any mode, whichever is earlier.

Further, the term 'buyer' has been defined to mean a person whose total sales, gross receipts or turnover from the business carried on by him exceeds INR 10 crores during the financial year immediately preceding the financial year in which the purchase of goods is carried out.

The section further provides that if any sum is credited to any account, whether called "suspense account" or by any other name, in the books of the buyer liable to pay such income, such credit of income shall be deemed to be the credit of such income to the account of the payee (i.e. seller) and the provisions of this section shall apply accordingly.

However, the provisions of section 194Q shall not apply to transactions on which:

a. tax is deductible under any of the provision of the IT Act; and
b. tax is collectible under the provisions of section 206C of the ITA other than transaction to which section 206C(1H) of the ITA applies.

Central Board of Direct Taxes ('**CBDT**'), in order to clarify on the applicability of the provisions of section 194Q of the ITA on transactions carried through various stock exchanges, issued a circular dated 30 June 2021. Per the said circular, it was clarified that the provisions of section 194Q should not be applicable to transactions in securities traded through recognized stock exchange or cleared and settled by the recognized clearing corporation.

The said circular further clarified that the provisions of section 194Q of the ITA shall not apply to a non-resident whose purchase of goods from seller resident in India is not effectively connected with the permanent establishment of such non-resident in India. For this purpose, "permanent establishment" shall mean to include a fixed place of business through which the business of the enterprise is wholly or partly carries on.

Collection of tax at source

Section 206(1H) of the ITA mandates a seller to collect tax at source at the rate of 0.1% of the consideration value of the goods (likely to include shares and securities) sold exceeding value of INR 5 million.

The term ‘seller’ has been defined to mean a person whose total sales, gross receipts or turnover from the business carried on by him exceeds INR 10 crores during the financial year immediately preceding the financial year in which the sale of goods is carried out.

The seller is not required to collect tax at source under section 206C(1H), if the buyer is liable to deduct tax at source under any other provision of this Act on the goods purchased by him from the seller and has deducted such amount.

The rate at which tax is required to be collected is to increase in specified situations (i.e., non-furnishing of the Permanent Account Number or the Aadhaar number to the seller or non-filing of returns subject to specified conditions).

The CBDT, in order to clarify on its applicability on transactions carried through various stock exchanges, issued a circular dated 29 September 2020. Per the said circular, it is clarified that the provisions of section 206C(1H) should not be applicable to transactions in securities traded through recognized stock exchange or cleared and settled by the recognized clearing corporation.

Withholding at a higher rate

Section 206AA of the ITA

The income tax provisions provide that where a recipient of income (which is subject to withholding tax) does not have a Permanent Account Number (‘PAN’), then tax is required to be deducted by the payer at the higher of the following:

- rates specified in the relevant provisions of the ITA; or
- rates in force; or

- 20%.

The aforesaid rate of 20% is replaced by 5% in case tax is required to be deducted under section 194Q of the ITA.

In the case of non-residents not having a PAN, this provision requiring tax deduction at a higher rate does not apply if they furnish certain prescribed information/ documents. The CBDT had issued a notification granting certain relaxations from deduction of tax at a higher rate in the case of non-resident investors or a foreign company. The provisions of section 206AA of the ITA does not apply in respect of payments to be made which are in the nature of interest, royalty, fees for technical services, dividends and payments on transfer of any capital asset, provided the deductee furnishes certain details and specified documents to the deductor.

Section 206AB of the ITA

The Finance Act, 2021 has introduced a new provision - section 206AB in the ITA for deducting tax at higher rates on payments made to non-filers of income-tax returns. Section 206AB of the ITA applies where any sum or income or amount is paid, or payable or credited, by a person to a specified person and tax is required to be deducted at source as per provisions of the ITA (except under sections 192, 192A, 194B, 194BB, 194-IA, 194-IB, 194LBC, 194M or 194N of the IT Act).

The term 'specified person' has been defined to mean a person who has not filed the returns of income for both of the two assessment years relevant to the two previous years immediately prior to the previous year in which tax is required to be deducted, for which the time limit of filing return of income under section 139(1) has expired; and the aggregate of tax deducted at source and tax collected at source in his case is INR 50,000 or more in each of these two previous years. The Finance Act, 2022 has amended the definition of the term 'specified person' by reducing the period of non-furnishing of return from two years to one year. Further, specified person shall not include a non-resident who does not have a permanent establishment in India.

In case the aforesaid section is applicable, tax shall be deducted at higher of the followings rates:

- twice the rate specified in the relevant provision of the ITA; or
- twice the rate or rates in force; or
- the rate of five per cent.

If provisions of section 206AA and section 206AB of the ITA are applicable to a specified person, then, tax shall be deducted at higher of the two rates provided under the respective sections of the ITA.

Collection of tax at higher rate

Section 206CC of the ITA

Section 206CC of the ITA provides that where any person paying any sum or amount (which is subject to collection of tax at source) does not furnish PAN, then tax is required to be collected by person responsible for collecting such tax at the higher of the following:

- at twice the rate specified in the relevant provision of this ITA, or
- 5%.

The aforesaid rate of 5% is replaced by 1% in case tax is required to be collected under section 206C(1H) of the ITA.

Section 206CCA of the ITA

The Finance Act, 2021 has introduced a new provision - section 206CCA in the ITA for collecting tax at higher rates on payments made to non-filers of income-tax returns. The said section applies where tax is required to be collected at source under the provisions of Chapter XVII-BB, on any sum or amount received by a person from a specified person, the tax shall be collected at the higher of the following two rates:

- at twice the rate specified in the relevant provision of the ITA; or
- 5%.

The term ‘specified person’ has been defined to mean means a person who has not filed the returns of income for both of the two assessment years relevant to the two previous years immediately prior to the previous year in which tax is required to be collected, for which the time limit of filing return of income under sub-section (1) of section 139 has expired; and the aggregate of tax deducted at source and tax collected at source in his case is INR 50,000 or more in each of these two previous years. Also, the specified person does not include a non-resident who does not have a permanent establishment in India. The Finance Act, 2022, has amended the definition of the term ‘specified person’ by reducing the period of non-furnishing of return from 2 years to 1 year.

If provisions of section 206CC and section 206CCA of the ITA are applicable to a specified person, then, tax is required to be collected at higher of the two rates provided under the respective sections of the ITA.

Minimum Alternate Tax

The provisions of the ITA provides for levy of Minimum Alternate Tax ("**MAT**") on all companies. Under these provisions, where income-tax payable by a company on its total income as computed under the ITA is less than 15% (fifteen percent) of its book profits (computed in a prescribed manner), then the book profit is deemed to be total income and the tax is computed at 15% (fifteen percent) of its book profits.

Further, as per the provisions of the ITA, MAT provisions should not be applicable to a foreign company, if:

(1) it is resident of a country with which India has a DTAA, and it does not have a PE in India, in accordance with the provisions of the relevant DTAA; or

(2) it is resident of a country with which India does not have a DTAA, and it is not required to seek registration under Indian corporate laws.

In the current case, as a Fund is expected to be resident of Ireland with which India has a DTAA and it does not form PE in India and the income of a Fund would comprise of capital gains, and hence MAT should not be applicable to the Fund.

General Anti-avoidance Rule

The GAAR provisions are effective from 1 April 2017. GAAR may be invoked by the Indian tax authorities in case arrangements are found to be impermissible tax avoidance arrangements. A transaction can be declared as an impermissible avoidance arrangement, if the main purpose of the arrangement is to obtain a tax benefit and which also satisfies at least one of the four tests mentioned below:

(a) Creates rights or obligations which are ordinarily not created between parties dealing at arm's length;
(b) It results in directly / indirectly misuse or abuse of the ITA;
(c) It lacks commercial substance or is deemed to lack commercial substance in whole or in part; or
(d) It is entered into or carried out in a manner, which is not normally employed for bona fide business purposes.

In such cases, the Indian tax authorities are empowered to deny the benefits under a DTAA, re-allocate the income from such arrangement, or re-characterize or disregard the arrangement. Some of the illustrative powers are:

(a) Disregarding or combining or re-characterizing any step of the arrangement or party to the arrangement;
(b) Ignoring the arrangement for the purpose of taxation law;

(c) Relocating place of residence of a party, or location of a transaction or situs of an asset to a place other than provided in the arrangement;

(d) Looking through the arrangement by disregarding any corporate structure; or

(e) Re-characterizing equity into debt, capital into revenue, etc.

The above terms should be read in context of the definitions provided under the ITA. Further, the onus to prove that the transaction is not an impermissible avoidance arrangement is on the taxpayer. Also, earlier any resident or non-resident could approach the Authority for Advance Rulings ("**AAR**") to determine whether an arrangement can be regarded as an impermissible avoidance arrangement. However, vide the Finance Act, 2021, the government has proposed to constitute Board of Advance Rulings in place of AAR to carry out the work of AAR on or after the notified date (not yet notified). The GAAR provisions shall be applied in accordance with such guidelines and subject to such conditions and manner as may be prescribed. The GAAR provisions, if invoked, could result in denial of the beneficial provisions of the DTAA.

The Rules have come out with few exceptions where the provisions of GAAR shall not apply. A summary of the key exceptions for application of GAAR provisions as provided under the Rules, are set out below:

A. *Monetary Threshold Exemption*: The GAAR provisions should apply only where the tax benefit (to all the parties in aggregate) from an arrangement in a relevant year exceeds INR 30 million.

B. *Exemption to FPIs and P-Note holders:* SEBI registered FPIs are excluded from applicability of GAAR provisions if they do not avail benefits under a DTAA entered into by India. Hence, if an FPI proposes to avail the benefits of a DTAA, the GAAR provisions may apply in case of an impermissible avoidance arrangement. Investments in FPIs made by non-resident investors by way of offshore derivative instruments, directly or indirectly, are excluded from the ambit of the GAAR provisions.

Further, on 27 January 2017, the CBDT has issued clarification[2] on implementation of GAAR provisions in response to various queries received from the stakeholders and industry associations. Amongst others, the following is clarified:

- GAAR shall not be invoked merely on the ground that the entity is located in tax efficient jurisdiction. GAAR will not apply if the jurisdiction of FPI is finalised based on non-tax commercial considerations and the main purpose of the arrangement is not to obtain tax benefit;
- Specific Anti-Avoidance Rules ("**SAAR**") and GAAR can co-exist and may be applied depending on facts and circumstances of the case;

[2] Circular no 7 of 2017

- GAAR shall not be invoked in cases where the tax avoidance strategy is sufficiently addressed by the Limitation of Benefits ("**LOB**") clause in the DTAA;
- GAAR provisions shall not apply if the arrangement is held as permissible by the Authority for Advance Ruling or where the Court has explicitly and adequately considered the tax implication while sanctioning an arrangement;
- Two stage approval process will be followed for invoking GAAR.

Multilateral Convention to implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

The OECD released the Multilateral Convention to implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("**MLI**"). Once adopted, MLI will supplement the existing tax treaties that India has with several countries and incorporate anti-avoidance rules/ LOB conditions. At the time of signing the MLI, countries are required to submit a list of their existing tax treaties, which they would like to designate as Covered Tax Agreements ("**CTA**") i.e., agreements to be amended through the MLI. Together with the list of CTAs, the countries are also required to submit a preliminary list of their reservations and notifications in respect of the various provisions of the MLI.

Ireland has signed MLI, and India has been notified as a CTA which is effective from April 2020. The MLI, amongst others, includes a "**principal purpose test**", wherein DTAA benefits can be denied if one of the principal purposes of an arrangement or a transaction was to, directly or indirectly, obtain tax benefit unless it is established that granting that benefit would be in accordance with the object and purpose of the relevant DTAA.

Capital losses

As per the provisions of the ITA, short-term capital loss can be set-off against both short-term capital gains and long-term capital gains, but long-term capital loss can be set-off only against long-term capital gains. The unabsorbed short-term and long-term capital loss can be carried forward for 8 years. This is subject to the loss return for such Fund being filed within the prescribed due date to file the income tax return.

Securities Transaction Tax

A Fund will be liable to pay Securities Transaction Tax ("**STT**") in respect of dealings in Indian securities purchased or sold on the recognised stock exchanges in India. The applicable rates of STT are as follows:

(1) 0.1% (zero-point one percent) on purchase of equity shares in a company listed on a recognised stock exchange in India.

(2) 0.1% (zero-point one percent) on sale of equity shares in a company listed on a recognised stock exchange in India.

(3) 0.001% (zero-point zero one percent) on sale of units of equity oriented mutual funds on a recognised stock exchange in India.

(4) 0.025% (zero point zero two five percent) on sale of equity shares in a company or units of equity oriented mutual funds or (with effect from 1 October 2014) units of a business trust in a recognised stock exchange in India where the contract for sale is settled otherwise than by the actual delivery or transfer of share or unit.

(5) 0.05% (zero-point zero five percent) of option premium on sale of an option in securities.

(6) 0.125% (zero point one two five percent) of settlement price on sale of option in securities, where option is exercised.

(7) 0.01% (zero-point zero one percent) on sale of futures in securities.

(8) 0.001% (zero-point zero one percent) on sale of units of an equity-oriented fund to a mutual fund.

(9) 0.2% (zero-point two percent) on sale of unlisted securities under an offer of sale to the public.

The foregoing summary should not be considered to describe fully the income and other tax consequences of an investment in a Fund or w.r.t. the investments made by the Fund in India.

Prospective investors are strongly urged to consult with their tax advisors, with specific reference to their own situations, with respect to the potential tax consequences of their investment in the Fund.