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INFRASTRUCTURE SECTOR in INDIA

Certain Tax and Regulatory Aspects

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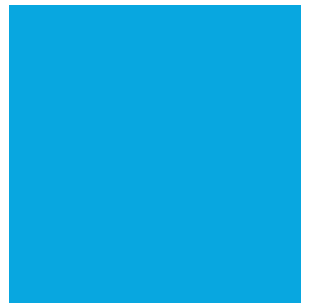
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PREFACE

India is now the 3rd largest economy in the world (purchasing power parity basis – PPP) with a Gross Domestic Product (GDP) of US\$ 10.21 trillion in 2021. The nominal GDP for the same period is US\$ 3.05 trillion making it the 5th largest economy in the world. The average annual GDP growth over the 5 years period (2016–2020) was + 6.7% (Economic Survey – India). The Covid 19 pandemic resulted in GDP Contraction in 2020 of (7.7%). The GDP Growth Estimate for 2021 is +9.5% (IMF) and for 2022 is +8.5%. This makes India the fastest growing large economy in the world.

Infrastructure is the backbone of the Indian economy. The projected investment in infrastructure over the next 5 years – 2021 to 2026 is projected at US\$ 1.4 trillion covering highways, energy, airports, smart cities, industrial corridors, metro projects, healthcare, logistics, etc. The increasing impetus in the infrastructure sector not only paves the way for the development of the said sector but for the growth and development of the other economic activities and social upliftment. The sector propels economic growth, generates employment and lays the foundation for long term sustainable economic development. 100% Foreign investment is permissible in most of the sectors under automatic route and hence it presents exciting opportunities for global infra companies and investors.

The lower corporate tax rate of 25.17% coupled with exemption from the minimum alternative tax (MAT), tax holidays for certain infra projects and a withholding tax of only 5% on external commercial borrowings has made India a tax attractive jurisdiction. Most infra projects also enjoy concessional tax treatment under the Goods and Services Tax regulations.

In view of the large domestic economy, high growth rate, favorable fiscal and tax regime, liberal foreign investment regulations and the thrust on infra sector makes it the most happening and exciting place for global and domestic investors.

This publication provides an overview of the infrastructure sector in India and covers governing regulations, foreign investment regulations, Income–tax regulations, Indirect tax regulations, etc. It examines the involvement of the public and private sector in carrying out infrastructure operations in India.

We hope you find this publication relevant and useful.

Happy Reading!

‘You and I come by road or rail, but economists travel on infrastructure.’

– Margaret Thatcher

FOREWORD



Mr. Jitender Balakrishnan

Ex- Deputy Managing Director, IDBI Bank Ltd.

The infrastructure sector is expected to play a major role as India focuses its priorities to become among the largest Economies in the World. Gaps in infrastructure has been an impediment to economic growth in terms of movement of goods, higher operational and logistics costs, poor connectivity, and imbalances in resource availability.

The recent emphasis by Government on Infrastructure has added a fillip to the sector and investment outlays are projected at over USD 1.5 trillion in next 5 years. This presents an excellent opportunity to fill gaps in Roads and Highways, Railways, development of Ports and Airports, support to initiatives like "Housing for All" and "National Smart Cities Mission." Besides this, the Power sector is focusing on Solar Energy as it strategically reassesses coal based Thermal Plants in the overall energy context, to reduce Carbon Footprints as part of support to

Climate Change Initiatives.

To meet the needs of large infrastructure projects, there is need to develop a robust framework to attract funds and expertise. The emphasis, inter alia would be on Foreign Direct Investment (FDI) and Public Private Partnership (PPP) like models to drive Investments and execution. In Budget 2020-21 the Finance Ministry had also proposed setting up a new Development Financial Institution (DFI) – The National Bank for Infrastructure & Development. Hopefully the new DFI will have the developmental attitude, skills and understanding, akin to the earlier DFIs like IDBI and ICICI (before they became Universal Banks), to provide a long- term holistic approach when assessing the needs – particularly in difficult times in the Project life cycle – of long gestation Projects with Regulatory, Environmental, Tax and Accounting implications.

FOREWORD

It is at this opportune time with Government's renewed emphasis on infrastructure and demands picking up, that I am happy to see **RSM India**, a renowned and leading provider of Audit, Tax and Consultancy services, coming out with a Publication, "**Infrastructure Sector in India – Certain Tax and Regulatory Aspects.**" The Publication is a single point Reference guide giving an overview on Infrastructure Sector and its Subsectors in

India and providing clarity while covering Financing models, Regulatory, Tax and Accounting aspects.

The Publication will be useful for Investors and Project Developers, in particular foreign Entities to enable them to analyse options with a fair knowledge of local conditions and an understanding of Risk, Regulatory and Tax aspects and their implications at various stages of the Project life cycle.

INFRASTRUCTURE SECTOR IN INDIA

- Certain Tax And Regulatory Aspects

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development of the country, thus encouraging a two-way growth process. The changing infrastructure landscape in India has generated significant interest among international investors. Further, favorable valuation and earnings outlook makes this sector more attractive. At the same time, infrastructure projects have long gestation periods requiring experience, long term view and it would entail significant funding requirements from own sources as well as from lenders. Accordingly, the PPP has emerged as one of the optimum solutions for executing infrastructure projects.

National Institution for Transforming India, also known as NITI Aayog, was formed on 1 January 2015. It is the premier policy think tank of the Government of India, providing directional and policy inputs. The PPP Vertical of NITI Aayog is actively working towards deepening the reach of public-private partnerships as the preferred mode for implementation of infrastructure projects. During 2020–21 (1 April 2020 to 31 March 2021), 125 PPP projects, with a total cost of INR 1,72,314 crore (US\$ 23.09 billion), were appraised by the PPP Vertical of NITI Aayog. This includes 123 Central Government projects and two State projects. The sector-wise distribution of the PPP projects appraised is given in the table below:

S. No.	Project Appraised	No. of Projects	Total Cost (INR In Crores)
1	Roads	69	63,279
2	Ports	12	3,359
3	Eco Tourism	10	2,232
4	Silos	1	401
5	Petroleum Reserves	4	27,728
6	Ropeway	1	996
7	Telecom	9	29,199
8	Railway Stations	6	7,600
9	Railway Passenger Trains	12	30,099
10	Metro	1	7,420
	Total	125	1,72,314

Source: <http://niti.gov.in/verticals/ppp>

Some common PPP models that are generally used to commission infrastructure projects include the following:

- **Build Operate Transfer (BOT) or Design, Build, Operate Transfer (DBOT):** A private-sector agent agrees to design and build an infrastructure project, operate it, and eventually transfer ownership rights to the Government, which agrees to buy a certain amount of output to cover the initial investment. Private sector partner has to bring the finance for the project and take the responsibility to construct and maintain it. The Government will allow private sector partner to collect revenue from the users. The national highway projects contracted out by NHAI under PPP mode is a major example for the BOT model.
- **BOT (Annuity):** Under this model, the payments are made at regular intervals and a private party does not bear the commercial risk or risk of traffic.
- **The Hybrid Annuity Model:** It is generally used for highway development projects; For example, 40% of the construction cost is taken on by the Government to aid the private developer. The remaining 60% is paid as annuity payments with interest after completion of the project. The private party is protected from inflation and traffic risk.
- **BOLT Model:** In this approach, the government gives a concession to a private entity to build a facility (and possibly design it as well), own the facility, lease the facility to the public sector and then at the end of the lease period transfer the ownership of the facility to the Government.



Engineering Procurement Construction (EPC): EPC Companies are facilitators of construction projects. These companies possess highly sophisticated technology and expertise to manage construction projects. They provide start to end services, right from design to commissioning of a project.

Tabulated below in detail are the basic PPP models that are prevalent in project development:

1.1.1. Management Contracts

A design–build P3 is similar to a client–contractor arrangement. The private partner designs and builds the facility, while the public partner provides the funds for the project. The public partner retains ownership of the project and any assets generated through its use.

Modes	Management Contract (without rehabilitation/ expansion)	Management Contract (with rehabilitation/ expansion)
Ownership of Capital Assets	Public	Public
PPP duration	Short – medium (e.g. 3– 5yrs)	Medium – long
Capital investment focus & responsibility	Capital Investment: Not the focus Responsibility: Public	Capital Investment: Limited Focus Brownfield (Rehabilitation/expansion) Responsibility: Private
Assumption of Risks	Risk: Low Revenues: Predetermined fee, possibly with performance incentives	Risk: Medium Revenues: Tariff / Revenue share
Private partner roles	Management of operation and maintenance	Minimum Capex, Management, Maintenance
Features, relevance in India	These are prevalent in India across sectors.	This mode has been adopted in the power distribution and water supply sectors

1.1.2. Lease Contract

A lease P3 involves the public owner leasing a facility to a private firm. The private company must operate and provide maintenance for the facility per specified terms, including additions or a remodeling process.

Modes	Lease	Build Lease Transfer (BLT) or Build-Own Lease-Transfer	Build-Transfer Lease (BTL)
Ownership of Capital Assets	Public	Private (Leased to the Government)	Public
PPP duration	Medium (e.g., 10- 15yrs)	Medium (e.g. 10 - 15yrs)	Medium (e.g., 10- 15yrs)
Capital investment focus & responsibility	Capital Investment: Not the focus Responsibility : Public	Capital Investment : Greenfield Responsibility: Private	Capital Investment : Greenfield Responsibility: Private
Assumption of Risks	Risk: High Revenues: Revenue from Operations	Risk: Low-medium Revenues: Pre-set lease from the Government	Risk: High Revenues: Revenue from User Charges
Private partner roles	Management and maintenance	Capex	Capex & Operation
Features, relevance in India	These are prevalent in India across sectors.	This mode has been adopted in the railway projects.	This mode involves building an asset, transferring it to the Government and leasing it back.

1.1.3. Concessions

With a concession P3, the private agency operates and maintains the facility for a specific period of time. The public partner has power over the ownership, but the private partner possesses owner rights over any addition incurred while the facility is being operated under its domain.

Modes	Area Concession
Ownership of Capital Assets	Public
PPP duration	Long (e.g. 20–30 yrs.)
Capital investment focus & responsibility	Capital Investment: Brownfield/Expansions Responsibility :Private
Assumption of Risks	Risk: High Revenues: Tariff revenue
Private partner roles	Design, finance, construct, manage, maintain
Features, relevance in India	In this model, the private sector (concessionaire) is responsible for the full delivery of services in a specified area, including operation, maintenance, collection, management, and construction and rehabilitation of the system. Importantly, the operator is now responsible for all capital investment while the assets are publicly owned even during the concession period. For example, water distribution concession for a city or area within the city.

1.1.4. Build–Operate Transfer Contracts

Under a build–transfer–operate P3, the private partner builds the facility and transfers it to the public partner. The public partner then leases operation of the facility to the private party under a long–term lease agreement.

Modes	Design–build operate (DBO)	Build–operate transfer (BOT)/ Design–Build Finance Operate Transfer (DBFOT)	Build–operate transfer (BOT) Annuity
Ownership of Capital Assets	Public	Public	Public
PPP duration	Short medium (e.g. 3–5 yrs.)	Long (e.g. 20–30 yrs.)	Long (e.g. 20–30 yrs.)
Capital investment focus & responsibility	Capital Investment : Greenfield Responsibility: Public	Capital Investment : Greenfield Responsibility: Private	Capital Investment : Greenfield Responsibility: Private
Assumption of Risks	Risk: Medium–High Revenues: Tariff revenue	Risk: High Revenues: Tariff revenue	Risk: Low Revenues: Annuity revenue / unitary charge
Private partner roles	Design, construct, manage, maintain	Design, finance, construct, manage, maintain	Design, finance, construct, manage, maintain
Features, relevance in India	Not very common in India. Typically financing obligation is not retained by the public entity	This is most common form of BOT concession in India.	This has been adopted for NHAI highway projects in the past. More recently, it is the preferred approach for socially relevant projects where revenue potential is limited.

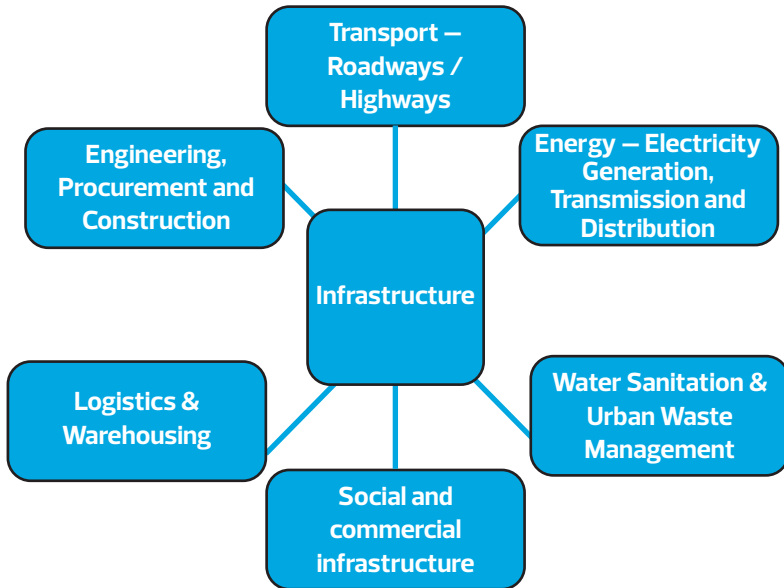
1.1.5. Build-own operate Transfer (BOOT) Contracts

In some cases, the public partner builds, possesses, and operates the project for a limited time, and then the facility is transferred, free of charge and including ownership, to the public agency. This may be known as a build-own-operate, transfer P3.

Modes	Build-own operate transfer (BOOT) or DBOOT	Build-own operate (BOO)
Ownership of Capital Assets	Private	Private
PPP duration	Long (e.g. 20-30 yrs.)	Perpetual
Capital investment focus & responsibility	Capital Investment: Greenfield Responsibility :Private	Capital Investment: Greenfield Responsibility :Private
Assumption of Risks	Risk: High Revenues: Tariff revenue	Risk: High Revenues: Tariff revenue
Private partner roles	Design, construct, own, manage, maintain, transfer	Design, finance, construct, own, manage, maintain
Features, relevance in India	This is most common form of BOOT concession in India.	Under this structure the asset ownership is with the private sector and the service / facility provision responsibility is also with the private sector.

1.2 Sub-Sectors

The Infrastructure sector can be divided into several verticals. This publication focuses on some of the accounting, tax and regulatory aspects on the following sub-sectors which have a significant role to play in infrastructure development in the country –



1.3 Brief Description of the sub-sector and Regulatory Framework

1.3.1 Transport – Roadways / Highways

The development of road infrastructure has been a primary focus due to robust demand, higher investments and opportunities. India has one of the largest road networks across the world, spanning over a total of 5.8 Million kms. This road network transports 64.5% of all goods in the country and 90% of India's total passenger traffic uses road network to commute.

The Indian road network would grow exponentially with rapid growth in national and state highways. The Government is implementing various projects



like Pradhan Mantri Gram Sadak Yojana (PMGSY) and Bharatmala Pariyojana across the country, which shall make the sector more lucrative.

In Union Budget 2021–22, various National Highway projects were announced in different states to the tune of INR 2.27 lakh crores (US\$ 30.47 billion) to be commenced in coming years. Further, an enhanced outlay of INR 1.18 lakh crores (US\$ 15.85 billion) for Ministry of Road Transport and Highways was also announced.

The Ministry of Road transport and Highways is the primary regulator for formulation and administration of the rules and regulations relating to road transport and it works through various implementing agencies.

With the Government permitting 100 per cent foreign direct investment (FDI) in the road sector, several foreign companies have formed partnerships/ joint venture with Indian players to capitalize on the sector's growth.

The Indian Railways is among the world's largest rail networks. The Indian Railways route length network is spread over 115,000 kms, with 12,617 passenger trains and 7,421 freight trains each day India's railway network is recognized as one of the largest railway systems in the world under the single management.

Under Union Budget 2021–22, the Indian Railways received INR 1.10 lakh crores (US\$ 14.77 billion). Out of this allocation, INR 1.07 lakh crores (US\$ 14.36 billion) is for capital expenditure.

The Indian Railways have prepared a National Rail Plan for India – 2030. The Plan is to create a 'future ready' Railway system by 2030.

1.3.2 Energy – Power Sector

India's power sector is one of the most diversified sectors in the world. There are wide sources of power generation in our country ranging from conventional sources such as coal, lignite, natural gas, oil, hydro and



nuclear power to viable non-conventional sources such as wind, solar, and agricultural and domestic waste. Under this sector a significant change is undergoing which redefined the industry outlook.

Further, the Government has introduced Ujwal DISCOM Assurance Yojana (UDAY) Scheme which will help in financial turnaround and revival of electricity distribution companies of India. The power sector has been registering a strong growth.

'Power for All' initiative GOI has accelerated the capex in this sector. The Ministry of Power is responsible for evolving general policy in the field of Energy. Total installed capacity of power stations in India stood at 383.37 Gigawatt (GW) as on 31 May 2021. In Union Budget 2021-22, it was announced that a revamped reforms-based result-linked power distribution sector scheme will be launched with an outlay of INR 3.06 lakh crores (US\$ 41.08 billion) over 5 years. The scheme will provide assistance to DISCOMS (distribution companies) for Infrastructure creation including pre-paid smart metering and feeder separation, upgradation of systems, etc., tied to financial improvements.



Between April 2000 and March 2021, the industry attracted US\$ 15.36 billion in FDI, accounting for 2.90% of total FDI inflows in India.

1.3.3 Water Sanitation & Urban Waste Management.

Consequent to the Swachh Bharat Initiative, providing clean drinking water, sanitation and effective disposal of urban waste are two emerging areas for participants of infrastructure industry to venture in.



The Ministry of Drinking Water and Sanitation is responsible for implementation of the Swachh Bharat Abhiyan in rural

India. The Municipal Solid Wastes (Management and Handling) Rules, 2000 has made every municipal authority responsible for infrastructure for segregation and processing of municipal solid waste. By 2025, the waste management market size in India is projected to be worth ~USD 14 Billion with an annual growth hovering around 7%, resulting into opportunities for businesses.

1.3.4 Social and Commercial Infrastructure

Social and Commercial Infrastructure in India includes educational and medical institutions, hospitals, hotels (3-star and above), cold chain facilities, industrial parks / SEZ, tourism facilities, etc. as mentioned in the harmonized master list issued by the Government. The above forms of infrastructure are vital as they promote inclusive growth.

This sector has more of private involvement rather than that of the Government. Some latest trends in some of these industries are highlighted below –

- **Hotels & Tourism** – The hotel and tourism industry are among the top 10 industries in India to attract the highest FDI. As per the data released by DIPP, during the period April 2000–March 2021, the hotel and tourism sector attracted around US\$ 15.66 billion of FDI. International hotel chains are increasing their presence in the country, as it will account for around 50% share in the Tourism & Hospitality sector of India by 2022.
- **Education** – The education sector in India is poised to witness major growth in the years to come as India will have world's largest tertiary-age population of over 119 million by 2024. The education



and training sector in India have witnessed some major investments and developments in the recent past. The total amount of FDI inflow into the education sector in India stood at US\$ 4.5 billion from April 2000 to March 2021.

- **Hospitals** – Healthcare has become one of India's largest sectors both in terms of revenue and employment. The COVID-19 pandemic has increased the importance of healthcare infrastructure significantly. Even the most developed economies were struggling during these testing times. There is a significant scope for enhancing healthcare services in India considering that healthcare spending as a percentage of Gross Domestic Product (GDP) is rising. In Union Budget 2021-22, the GOI announced a new centrally sponsored scheme, PM AtmaNirbhar Swasth Bharat Yojana which will be launched with an outlay of about INR 64,180 crores (US\$ 8.62 billion) over 6 years. This will develop capacities of primary, secondary, and tertiary care Health Systems, strengthen existing national institutions, and create new institutions, to cater to detection and cure of new and emerging diseases. Further, the hospital and diagnostic centers attracted FDI worth US\$ 7.23 billion between April 2000 and March 2021. The hospital industry size is estimated to touch US\$ 372 billion by 2022.
- **Sports and amusement parks** – The Indian amusement and theme park industry was growing at a compounded annual growth rate of more than 17.5 per cent with annual revenue of around Rs 17 billion. In India, there are about 150 amusement/water parks and about 1,000 indoor amusement centres. However, this industry has been badly hit due to the COVID-19 pandemic which triggered various lockdowns and tighter social distancing norms.



1.3.5 Logistics and Warehousing

Logistics and warehousing play an important role in the industrial advancement of the country. They are a fundamental part of business infrastructure and one of the key enablers in the global supply chain.

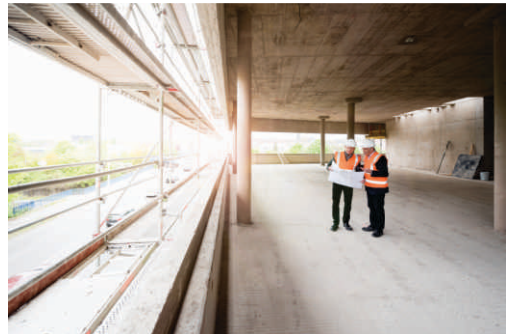


In 2017, the logistics sector was given infrastructure status in India. Logistics market in India stood at US\$ 160 billion in 2017. The sector is expected to grow at a CAGR of 10.5% to reach US\$ 255 billion by 2022. The warehousing market is also expected to grow to around US\$ 20 billion by 2025.

The logistics sector, including infrastructure, is expected to reach US\$ 500 billion annually by 2025.

1.3.6 Engineering, Procurement and Construction Companies (EPC Companies)

Although, EPC is not amongst the sub-sectors featuring in the master list of infrastructure sub-sectors, EPC companies have a major role to play in facilitating infrastructure projects. The concept of EPC has evolved over the last few years with several domestic as well as foreign players. It is a preferred form of contracting especially in the construction industry. With the growing needs of infrastructure in India, EPC Companies are likely to be benefitted.



2.1 List of Applicable Laws and Regulations

The below table lists down the laws and regulations along with respective Governing Body applicable to the various sub-sectors within the infrastructure sector as mentioned in Chapter 1.



Sub-sector	Governing Body	Acts / Laws
Transport – Roads & Highways	<p>Ministry of Road Transport & Highways:</p> <ul style="list-style-type: none"> – National Highway Authority of India – NHAI is an autonomous body responsible for the development, maintenance and management of National Highways, totaling over 92,851.05 kms in length. The NHAI is also responsible for toll collection on several highways. – State Highway Authorities – Ministry of Rural Development 	<ul style="list-style-type: none"> – National Highways Act of India, 1998 – Central Road Fund Act, 2000 – The Control of National Highways (Land and Traffic) Act, 2002
Energy – Power Sector	<p>Ministry of Power and its various agencies – The Ministry of Power is mainly responsible for evolving general policy in the field of energy. It mainly deals with general policy making for the power sector and administering various electricity related laws.</p>	<ul style="list-style-type: none"> – Electricity Act, 2003

Sub-sector	Governing Body	Acts / Laws
Water Sanitation and Urban Waste Management	Ministry of Drinking Water and Sanitation (also known as Ministry of Jal Shakti) – It is the Nodal Ministry for the overall policy, planning, funding and coordination of 2 flagship programs of the Government of India, namely, the National Rural Drinking Water Program (NRDWP) for rural drinking water supply and the Swachh Bharat Mission (Gramin) [SBM (G)] for sanitation in the country.	– Municipal and parastatal laws

2.2 Process of Selection of a Private Partner

2.2.1 The above-mentioned sector-wise regulatory authorities conduct a bidding process for selection of the private partner for any project. The type and number of bidding documents to be prepared will depend upon the nature of the project and also the type of procurement process that is envisaged. In a single stage procurement process, the following bidding documents are prepared:

- i. Notice inviting Tenders
- ii. Request for Proposal (RFP)
- iii. Project Information Memorandum Docket
- iv. Draft Agreement

In a two-stage procurement process, there will be one additional document called Request for Qualification (RFQ). Ministry of Finance, Government of India has issued model RFQ & RFP so as to standardize the process of procurement and reduce the effort involved in the bidding documents. These RFQs and RFPs inter alia provide conditions, upon fulfillment of which, a bidder is eligible to bid for the

project. For example, in case of a project of NHAI, it is mandatory for applicants to set up an SPV for construction / development of highways.

2.2.2 Some of the conditions obtained from sample RFQs / RFPs available in public domain are illustrated below –

Road and Highway Projects –

- Applicants may apply either as a sole firm or as a JV with other applicants. In case of a JV, the maximum number of partners is limited to 2.
- Formulation of more than one JV/associations with different partners for the same work is not allowed.
- The Applicant whether a sole applicant or lead member with joint venture(s) may include an Associate company also. Maximum numbers of key personnel of the associate firm during the RFP Proposal and implementation of contract is limited to 2.
- In case of JVs, the lead partner of the JV must fulfill a certain specified portion of the above-mentioned requirements.

Procurement of power –

- The Bidder should be a Company or a Consortium of Companies with one of the Company acting as the Lead Member of the Bidding Consortium.
- The Bidder can also be a foreign company on standalone basis or as a member of consortium at RFP stage. But before signing of agreement, it has to form an Indian Company registered under the Companies Act, 2013;
- Limited Liability Partnerships (LLPs) are not eligible for participation.
- A Bidder shall submit only one response in the same bidding process from one generation source, individually as Bidding Company or as a Member of a Bidding Consortium (including the Lead Member). The Parent Company / Affiliate / Ultimate Parent Company of the Bidding Company or a Member of

a Bidding Consortium shall not separately participate in the same bidding process. Further, if any Bidder has a Conflict of Interest with other Bidder(s) participating in the same bidding process, the Bid of all such Bidder(s) shall be rejected.

- Net worth criteria – Net worth must be greater than the threshold provided.
- The Bidder shall deposit a Bid Security

Solid Waste Management –

- The entities that are evaluated may be either the Bidding Company or the Lead Member of the Consortium.
- The bidder must have over 5 years of experience in developing and operating Municipal Solid Waste (MSW) projects of a certain capacity encompassing waste collection and transportation.
- Project-wise Net worth criteria must be met.

3.1 Background

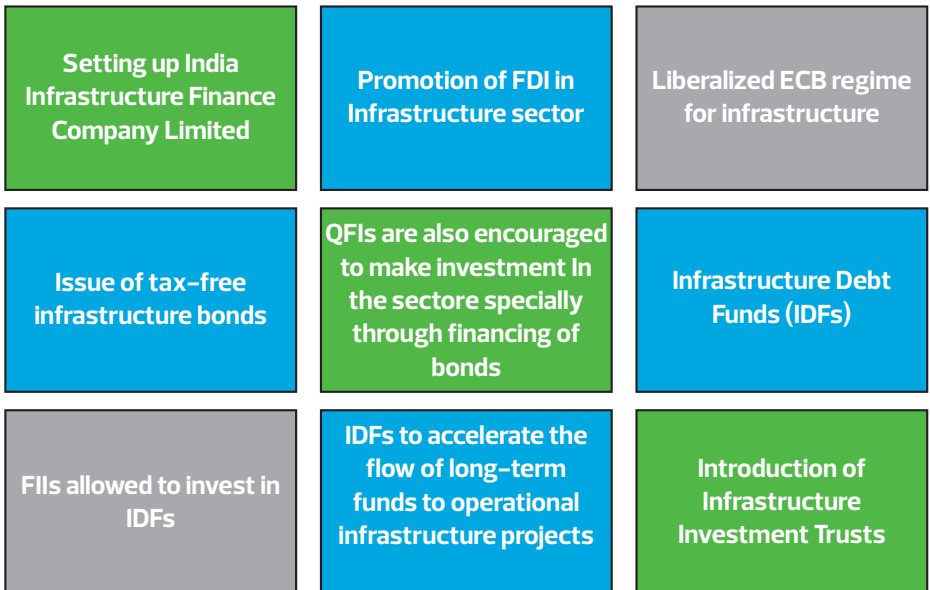
Traditionally, the Government through the budgetary expenditure was making infrastructure investment. But the present requirement is very huge for Government and over the last 10 years, several measures were taken by the Government to mobilize finance. With the advent of PPP models, a significant portion of investment is expected to come from the private sector too. Both the Government and the private entities aim to meet the funding requirements through the banking system, ECBs and capital market.

3.2 Financing Infrastructure Sector

The important sources of infrastructure finance in India are:

- Equity Funds – from domestic and foreign investors.
- Debt Funds – from commercial banks, bond market and Infrastructure debt funds.

3.3 Government Initiatives for attracting investments



4.1 Background

4.1.1 Foreign Investment in India is regulated by Foreign Exchange Management (Non-debt Instruments) Rules, 2019¹ ('Foreign Investment Regulations') issued by the Ministry of Finance on 17 October 2019 read with Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 (No. FEMA. 395/2019-RB) issued on 17 October 2019.

4.1.2 A person resident outside India or an entity incorporated outside India (other than citizen / entity of Pakistan or Bangladesh or a country sharing land border with India) can invest in India subject to Foreign Investment Regulations. Also, NRIs / OCIs (including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs) are allowed to invest in India.

4.1.3 Generally, 100% foreign investment is permissible in infrastructure sector subject to certain specified conditions which include norms for minimum capitalization, lock-in period, etc.

4.1.4 Further, Foreign Investment Regulations also prescribe certain requirements in respect of entry route, mode of funding, pricing, reporting requirements, documentation, etc. In this chapter, we have consolidated certain relevant aspects for foreign investment in the Indian infrastructure sector.



¹ The Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, stands repealed with effect from 17th October 2019. In place of the Repealed Regulations, the Central Government has notified the Foreign Exchange Management (Non-debt Instruments) Rules, 2019.

4.2 Foreign Investment in Infrastructure Sector in India

Sector	Route	% of Foreign Investment Permitted	Conditions Prescribed
Construction Development projects (which includes development of townships, construction of residential / commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships) (Refer Note 1 below)	Automatic	100 %	<ul style="list-style-type: none"> - Exit is permitted after completion of 3 years of lock-in-period. - Transfer of stake from NR to NR without repatriation not subject to lock in period or Government approval - Project shall conform to the laws / regulations of State Government / Municipal / Local bodies concerned
Industrial Parks (is a project in which quality infrastructure in the form of plots of developed land or built-up space or a combination with common facilities, is developed and made available to all the allotted units for the purposes of industrial activity) (Refer Note 2)	Automatic	100 %	<ul style="list-style-type: none"> - If conditions specified in Note 2 below are satisfied, then the conditions applicable to construction Development projects will not apply.

Sector	Route	% of Foreign Investment Permitted	Conditions Prescribed
Infrastructure Investment Trusts (InvIT) (Refer Note 3)	Automatic	100 %	- Subject to the regulations framed by Securities and Exchange Board of India or the directions issued by the Reserve Bank
Other Infrastructure sector such as: Power Sector, EPC Companies, Water Sanitation and Urban Waste Management, etc.	Automatic	100 %	- Subject to applicable laws/regulations.

Note 1

- Each phase of the construction development project would be considered as a separate project.
- The foreign investor will be permitted to exit on completion of the project or after development of trunk infrastructure i.e., roads, water supply, street lighting, drainage and sewerage.
- The foreign investor will be permitted to exit on completion of the project or after development of trunk infrastructure i.e., roads, water supply, street lighting, drainage and sewerage. However, foreign investor will be permitted to exit and repatriate foreign investment before the completion of project under automatic route subject to lock-in-period of 3 years which shall be calculated with reference to each tranche of foreign investment. Further, transfer of stake from a person resident outside India to another person

resident outside India, without repatriation of foreign investment will neither be subject to any lock-in period nor to any government approval.

- The project shall conform to the norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, bye-laws, rules, and other regulations of the State Government / Municipal / Local Body concerned.

The Indian investee company shall be responsible for obtaining all necessary approvals, including those of the building / layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules / bye-laws / regulations of the State Government / Municipal / Local Body concerned.

- The State Government / Municipal / Local Body concerned, which approves the building / development plans, will monitor compliance of the above conditions by the developer.
- Foreign investment is not permitted in an entity which is engaged or proposes to engage in real estate business, construction of farm houses and trading in transferable development rights (TDRs). 'Real estate business' shall not include development of townships, construction of residential / commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.
- Condition of lock-in period will not apply to Hotels and Tourist Resorts, Hospitals, Special Economic Zones (SEZs), Educational Institutions, Old Age Homes and investment by NRIs/ OCIs.
- Completion of the project will be determined as per the local bye-laws/rules and other regulations of State Governments.

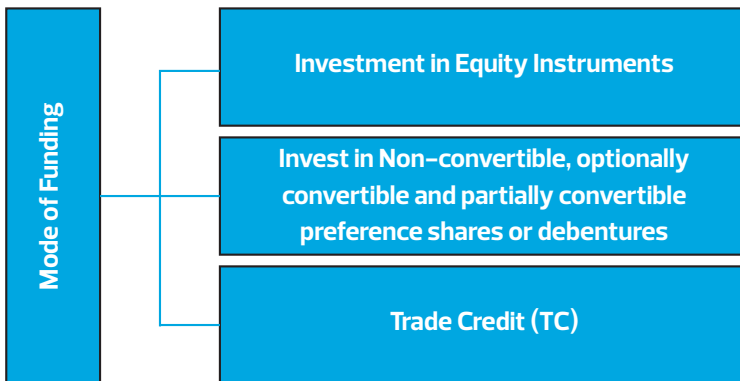
Note 2

- 100% foreign investment under automatic route is permitted in new and existing industrial parks. Foreign Investment in Industrial Parks would not be subject to the conditions applicable for construction development projects, provided the Industrial Parks meet with the under-mentioned conditions:
 - (i) It would comprise of a minimum of 10 units and no single unit shall occupy more than 50% of the allocable area as specified;
 - (ii) The minimum percentage of the area to be allocated for industrial activity shall not be less than 66% of the total allocable area as specified.

Note 3

- A person resident outside India is also permitted to invest in units of Infrastructure Investment Trusts (InvITs). The sale/ transfer/ redemption of units acquired/ purchased are subject to the regulations framed by Securities and Exchange Board of India or the directions issued by the Reserve Bank.

4.3 Mode of Funding and Pricing



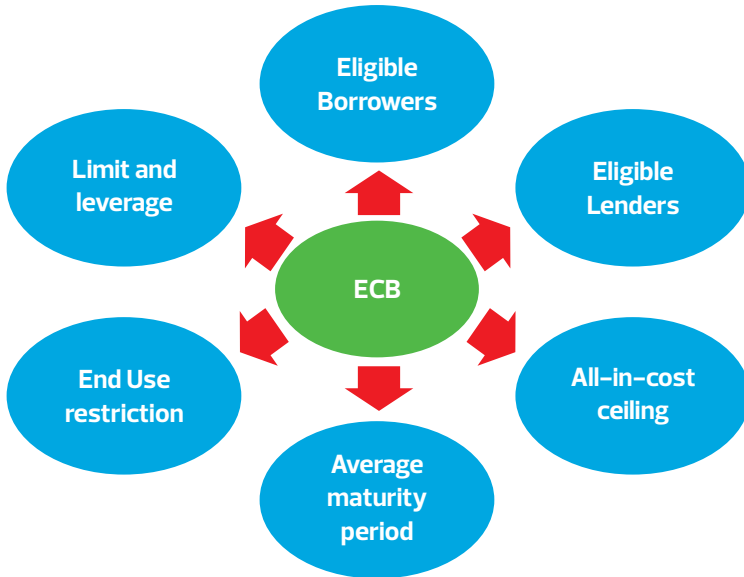
4.3.1 Investment in Equity Instruments

A person resident outside India can invest in **Equity Instruments** (means equity shares, fully compulsorily and mandatorily convertible preference shares, fully compulsorily and mandatorily convertible debentures and share warrants) of an Indian Company subject to the pricing guidelines prescribed under Foreign Investment Regulations.

- Price of Equity instruments of an Indian Company issued to persons resident outside India shall not be less than the Valuation of equity instruments to be done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a SEBI registered Merchant Banker or a Chartered Accountant or a practicing Cost Accountant in case of an unlisted Indian Company and the price worked out in accordance with relevant SEBI guidelines in case of listed Indian companies.
- In case of share warrants, their pricing and the price or conversion formula shall be determined upfront:
- Further, an Indian Company may issue rights / bonus shares to existing non-resident shareholders provided such issue is in accordance with Companies Act / SEBI regulations.

4.3.2 External Commercial Borrowings ('ECB') Route

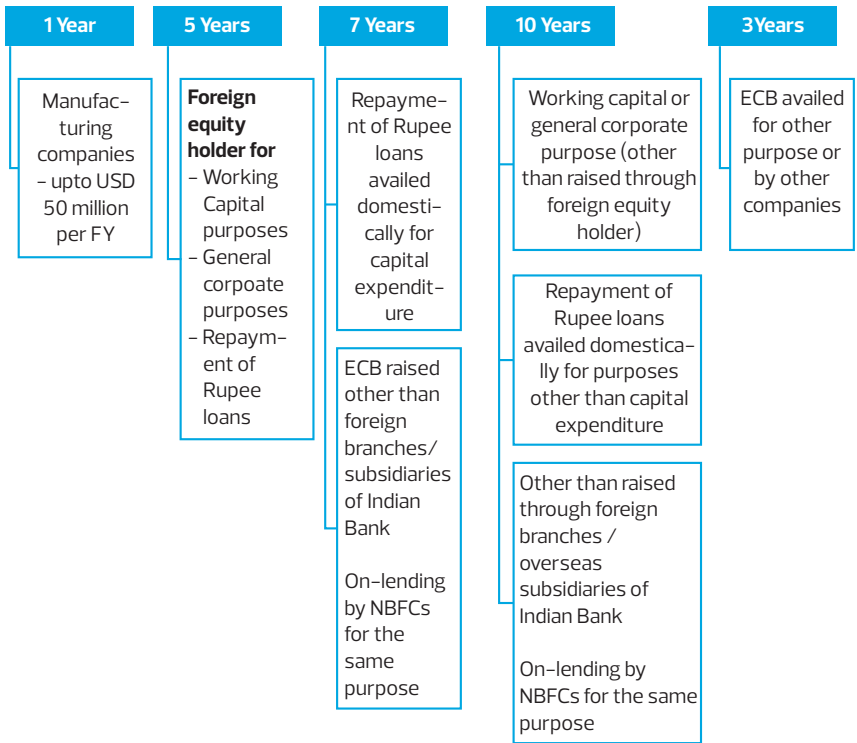
A person resident outside India can invest in Non-convertible, optionally convertible and partially convertible preference shares or debentures; however, the same shall be considered as debt and shall conform to External Commercial Borrowings (ECB) guidelines regulated under Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 for eligible borrowers, recognized lender, amount, maturity, end-uses, etc.



- **Merging of Tracks** - RBI has now merged the Track I (short term foreign currency ECB and Track II (long term foreign currency ECB) as 'Foreign Currency ('FCY') denominated ECB'. Further, RBI has also merged Track III (Rupee denominated ECB) and the framework on Rupee denominated bonds (i.e. masala bonds) as 'Rupee denominated ECB'.
- **ECB Limits** - ECB up to USD 750 million or its equivalent per financial year subject to compliance with ECB guidelines, can be raised under the automatic route.
- **Eligible Borrowers** - 'Eligible Borrowers' includes all entities eligible to receive foreign direct investment ('FDI'). Additionally, port trusts, units in special economic zones, SIDBI, EXIM Bank can also raise ECB. Further, in addition to above, registered entities engaged in micro-finance activities, viz., registered not for profit companies, registered societies / trusts / cooperatives and non-Government organizations can now avail INR denominated ECB. Accordingly, Infrastructure Companies are considered as eligible borrower.

- **Recognized Lender** – Any resident of Financial Action Task Force (FATF) or International Organization of Securities Commission (IOSCO) compliant country can provide ECB to eligible Indian borrowers. Also, please note that-
 - (a) Multilateral and regional financial institutions, where India is a member country, will be recognized lenders;
 - (b) Individuals as lenders can only be permitted if they are foreign equity holders or subscribers to bonds / debentures listed abroad; and
 - (c) Foreign branches / subsidiaries of Indian banks continue to be recognized lenders for FCY ECB (except FCCBs and FCEBs). Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.

- **Minimum Average Maturity Period ('MAMP')** – The MAMP for all ECBs is now prescribed as 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity. However, MAMP shall be as prescribed for certain cases. The cases are included in the figure.



- **End-uses** – ECB could not be availed for real estate activity or investment in capital market or equity investment.

'Real estate activities' to mean any real estate activity involving owned or leased property for buying, selling and renting of commercial and residential properties or land and also includes activities either on a fee or contract basis assigning real estate agents for intermediating in buying, selling, letting or managing real estate. However, this does not include construction / development of industrial parks / integrated township / SEZ, purchase / long term leasing of industrial land as part of new project / modernization of expansion of existing units or any activity under 'infrastructure sector' definition.

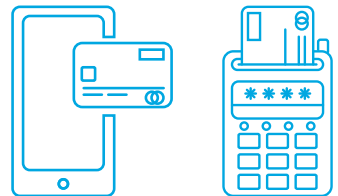
- **All-in-cost (AIC) ceiling** – Benchmark² plus 450 basis points per annum. It has been clarified that Export Credit Agency charges and guarantee fees,

whether paid in Rupees or FCY, will be included in AIC. Also, ECB proceeds cannot be used for payment of interest / charges.

- **Other costs** – Prepayment charge/ Penal interest, if any, for default or breach of covenants, should not be more than 2% over and above the contracted rate of interest on the outstanding principal amount and will be outside the all-in-cost ceiling.
- Any borrower who is otherwise in compliance of ECB guidelines, except for a delay in reporting of drawdown of ECB proceeds before obtaining LRN or Form ECB 2 returns, can regularize the delay by payment of specified late submission fee for delay in reporting.
- Eligible corporate borrowers who have availed Rupee loans domestically for capital expenditure in manufacturing and infrastructure sector and which have been classified as SMA-2 or NPA can avail ECB for repayment of these loans under any one time settlement with lenders. Lender banks are also permitted to sell, through assignment, such loans to eligible ECB lenders, provided, the resultant external commercial borrowing complies with all-in-cost, minimum average maturity period and other relevant norms of the ECB framework. Foreign branches/ overseas subsidiaries of Indian banks are not eligible to lend for the above purposes. The applicable MAMP will have to be strictly complied with under all circumstances.

4.3.3 Trade Credit (TC)

TC is also one of the modes of funding which can be in the nature of buyers' credit and/or suppliers' credit, and can be raised in any freely convertible foreign currency or Indian Rupees.



² Benchmark rate in case of FCY ECB/TC refers to 6-months LIBOR rate of different currencies or any other 6-month interbank interest rate applicable to the currency of borrowing, for e.g., EURIBOR. Benchmark rate in case of Rupee denominated ECB/TC will be prevailing yield of the Government of India securities of corresponding maturity.

- **TC Limits** – TCs upto USD 150 million or equivalent per import transaction for oil/gas refining & marketing, airline and shipping companies and for others USD 50 million or its equivalent per import transaction can be raised under the automatic route.
- **Eligible Borrower** – Any person resident in India and acting as an importer can raise TC.
- **Recognized Lender** – For buyers' credit, banks, financial institutions, foreign equity holders located outside India and financial institutions in International Finance Service Centers located in India can provide TC. Foreign branch / subsidiaries of Indian banks are permitted as recognized lenders only for foreign currency TC.
- **Period of TC** – In case of import of capital goods, TC can be raised for up to 3 years, whereas in case of non-capital goods, the period is capped at 1 year or the operating cycle, whichever is less.
- **All-In-Cost** – AIC ceiling is benchmark³ rate plus 250 basis points per annum.

4.3.4 Security for TC

TCs can be secured by movable assets (including financial assets) or immovable assets (excluding land in SEZs) of the importer, or through corporate or personal guarantees. TCs can also be secured by: (i) AD banks providing bank guarantees in favour of overseas lenders on behalf of the importer for an amount not exceeding the TC; (ii) overseas guarantees issued by foreign banks or overseas branches of Indian banks.

³ Benchmark rate in case of FCY ECB/TC refers to 6-months LIBOR rate of different currencies or any other 6-month interbank interest rate applicable to the currency of borrowing, for e.g., EURIBOR. Benchmark rate in case of Rupee denominated ECB/TC will be prevailing yield of the Government of India securities of corresponding maturity.

4.4 Transfer of Shares

4.4.1 Transfer of Equity instruments of an Indian company or convertible debentures by a person resident outside India

A person resident outside India holding equity instruments of an Indian Company or units in accordance with these Regulations may transfer equity instruments or units held by him in compliance with these Regulations and subject to terms and conditions. General permission available for the following:

- i. A person resident outside India (Other than NRI and erstwhile OCB) may transfer by way of sale or gift the equity instruments of an Indian company or convertible debentures to any person resident outside India (including NRIs).
- ii. NRI may transfer by way of sale or gift equity instruments or convertible debentures held by them to another NRI.
- iii. A person resident outside India can transfer equity instruments or units to a person resident in India by way of sale / gift or may sell the same on a recognized stock exchange in India as prescribed by SEBI, provided the same shall be in compliance with pricing guidelines and reporting requirements.
- iv. NRI / OCI holding equity instruments of an Indian company or units on a non-repatriation basis may transfer the same by way of gift to a NRI or OCI who shall hold it on non-repatriable basis.

4.4.2 Transfer of equity instruments of an Indian Company or units by a person resident in India

- i. A person resident in India holding equity instruments of an Indian company or units or NRI / OCI holding equity instruments of an Indian company or units on non-repatriation basis) may transfer the same to a person resident outside India by way of sale, subject to the entry routes, sectoral cap, pricing guidelines and reporting requirements.

- ii. A person resident in India or NRI / OCI holding equity instruments on non-repatriation basis may transfer the same to a person resident outside India by way of gift with prior approval of RBI and subject to prescribed conditions.

4.5 Downstream Investment

4.5.1 Downstream Investment means indirect foreign investment by an Indian entity or an Investment Vehicle into another Indian Company / LLP, by way of subscription or acquisition.

- Indirect Foreign Investment means downstream investment received by an Indian entity from
 - another Indian entity which has received foreign investment and the Indian entity is not owned and not controlled by resident Indian citizens or is owned or controlled by persons resident outside India or
 - An investment vehicle whose sponsor or manager or investment manager is not owned and not controlled by resident Indian citizens or is owned or controlled by persons resident outside India.
- 'Ownership of an Indian Company' shall mean beneficial holding of more than 50% of the equity instruments of such company. 'Ownership of an LLP' shall mean contribution of more than 50% in its capital and having majority profit share.
- 'Control' shall mean the right to appoint majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreement or voting agreement. For the purpose of LLP, 'Control' shall mean the right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of an LLP

4.5.2 Indian entity which has received indirect foreign investment shall comply with the entry route, sectoral caps, pricing guidelines and other attendant conditions as

applicable for foreign investment.

Explanation: Downstream investment by an LLP not owned and not controlled by resident Indian citizens or owned or controlled by persons resident outside India is allowed in an Indian company operating in sectors where foreign investment up to 100% is permitted under automatic route and there are no FDI linked performance conditions.

4.5.3 Downstream Investment made into Indian Companies will be subject to the following conditions:

- (a) The downstream investment should have the approval of the Board of Directors and also a Shareholders' Agreement, if any.
- (b) For the purpose of downstream investment, the Indian entity making the downstream investment shall bring in requisite funds from abroad and not use funds borrowed in the domestic markets. Downstream investments can be made through internal accruals. For this purpose, internal accruals means profits transferred to reserve account after payment of taxes. Further, raising of debt and its utilization shall be in compliance with the Act, rules or regulations made thereunder.
- (c) Equity instrument of an Indian company held by another Indian company which has received foreign investment and is not owned and not controlled by resident Indian citizens or is owned or controlled by persons resident outside India may be transferred to:
 - i. A person resident outside India, subject to reporting requirements in Form FCTRS;
 - ii. A person resident in India subject to adherence to pricing guidelines.
 - iii. An Indian company which has received foreign investment and is not owned and not controlled by resident Indian citizens or owned or controlled by person resident outside India.

- (d) The first level Indian company making downstream investment shall be responsible for ensuring compliance with the provisions of these regulations for the downstream investment made by it at second level and so on and so forth. Such first level company shall obtain a certificate from its statutory auditor on an annual basis. Such compliance shall be mentioned in the Director's report in the Annual Report of the Indian company. In case statutory auditor has given a qualified report, the same shall be immediately brought to the notice of the Regional Office of the Reserve Bank in whose jurisdiction the Registered Office of the company is located and shall also obtain acknowledgement from the RO.
- (e) The provisions at (c) and (d) above shall apply accordingly for an LLP.

4.6 Remittance and Repatriation

4.6.1 When shares & securities held by non-resident investors are sold, remittance of sale proceeds is allowed provided the securities are held on repatriation basis and the sale is made in compliance with pricing guidelines.

4.6.2 Dividends are freely repatriable without any restrictions (net after Tax deduction at source or Dividend Distribution Tax, if any, as the case may be).

Interest on fully, mandatorily & compulsorily convertible debentures is also freely repatriable without any restrictions (net of applicable taxes).

4.7 Reporting Requirements

4.7.1 Reserve Bank, with the objective of integrating the extant reporting structures of various types of foreign investment in India, has introduced an online Single Master Form (SMF) reporting.

4.7.2 Prior to the implementation of the SMF, Reserve Bank had provided an interface to the Indian entities, to input the data on total foreign investment in a specified format. Indian entities not complied with this pre-requisite will not be able to receive foreign investment (including indirect foreign investment) and will be non-

compliant with FEMA and regulations made thereunder.

4.7.3 Indian entities, which have received foreign investment, are required to input the data on total foreign investment in a specified format.

Sr. No.	Particulars	Form Name	Due Date
1	Issue of equity instruments	Form FC-GPR	30 days from date of issue of equity instruments.
2	Transfer of equity instruments	Form FC-TRS	60 days of transfer of equity instrument or receipt / remittance of funds, whichever is earlier
3	Annual Return on Foreign Liabilities and Assets	Form FLA	On or before 15 July each year
4	Obtaining LRN	Form ECB	Before drawing ECBs or paying any charges thereof
5	Monthly ECB returns	Form ECB-2	7 days from the close of the month
6	Downstream investment	Form DI	Notify the Secretarial for Industrial Assistance, DPIIT within 30 days of such investment, even if equity instruments have not been allotted along with modality of investment in new / existing ventures. Also, Form DI to be filed within 30 days from the date of allotment of equity instruments

4.8 Other form of Entities

4.8.1 Investment in a Limited Liability Partnership (LLP)

- A person resident outside India or an entity incorporated outside India

(other than Citizen / entity of Pakistan or Bangladesh), not being a FPI or a FVCI, may contribute to the capital of a LLP operating in sectors / activities where foreign investment up to 100% is permitted under automatic route and there are no FDI linked performance conditions. Conversion of such LLP into a company is permitted under automatic route.

- Similarly, conversion of a company having foreign investment and operating in sectors / activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into an LLP is permitted under automatic route.
- Investment by way of "profit share" shall fall under the category of reinvestment of earnings.
- Investment in LLP is subject to the conditions prescribed in the LLP Act, 2008.
- Investment in LLP either by way of capital contribution or by way of acquisition/ transfer of profit shares, should not be less than the fair price worked out as per any valuation norm which is internationally accepted as per market practice and a valuation certificate shall be issued by the CA or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government.

4.8.2 Establishment in India of a Branch or Liaison office or project offices in India

- Applications from foreign companies (a body corporate incorporated outside India, including a firm or other association of individuals) for establishing BO / LO / PO in India shall be considered by the AD Category-I bank as per the guidelines given by Reserve Bank.
- If the principal business of the entity resident outside India falls under sectors where 100% FDI is allowed and the entity seeks to open a BO / LO / PO, the AD Category-I bank may consider such applications under the delegated powers.

4.9 Other Relevant Aspects

- 4.9.1** Cross border merger is permissible in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 notified under the Companies Act, 2013 and subject to regulations under FEMA.
- 4.9.2** If any person contravenes any provisions of FEMA except hawala transaction, he may file an application for compounding to the regional office of Reserve Bank. Further, the specific guidelines along with proposed penalty amount in case of compounding proceedings have been prescribed under FEMA.
- 4.9.3** An Indian company has been granted general permission for conversion of ECB including those which are matured but unpaid into equity, subject to certain conditions and reporting.

5.1 Background

Accounting Standards (AS) are rules regarding recognition, measurement and disclosure aspects in financial statements and relate to codification of generally accepted accounting policies. These are norms of accounting policies and practices which direct how the items which make up the financial statements should be dealt with in accounts and presented in financial statements. There are various accounting standards followed worldwide (e.g. US GAAP, IFRS, Indian GAAP, etc.)



With a view to converge with the international norms of accounting as laid down in International Financial Reporting Standards (IFRS), the Ministry of Corporate Affairs (MCA) notified Companies (Indian Accounting Standards or "Ind AS") Rules, 2015, popularly known as IndAS. In India, until FY 2015–16, all entities followed the Indian GAAP, notified under Companies (Accounting Standards) Rules, 2006. However, with effect from FY 2016–17, the MCA has prescribed a roadmap for adoption of Ind AS in phases.

In the following paragraphs, we have covered certain pertinent accounting aspects for infrastructure companies under Indian GAAP as well as Ind AS applicable to infrastructure companies.

5.2 Accounting for Service Concessions

5.2.1 Accounting under Indian GAAP

ICAI's Exposure Draft (ED) of Accounting for Service Concessions Arrangements by Concessionaires Guidance Note deals with accounting for service concession arrangement.

The ED provides specific guidance for public-to-private service concession arrangements in which: the public sector entity controls or regulates the services

provided with the infrastructure and their prices; and controls any significant residual interest in the infrastructure. The operator does not recognize the property, plant and equipment (PPE) constructed as a part of the service concession arrangement. As per the service concession agreement, the operator is considered to have a right to access, rather than a right to use/right of ownership over the infrastructure asset. This right is recognized either as an intangible asset or a financial asset based on terms of the arrangement.

For accounting purposes, service concession arrangements are normally divided into of two phases – construction phase and operations and maintenance phase. During construction phase, the operator recognizes and measures revenue and costs related to the construction or upgrade of infrastructure, contracts. Hence, in the construction phase, the operator will generally recognize revenue as construction activity based on the value of the services performed (construction cost plus a fair margin).

5.2.2 Indian Accounting Standards

Ind AS 115 Revenue from Contracts with Customers Appendix D Service Concession Arrangements provides specific guidance for public-to-private service concession arrangements in which: the public sector entity controls or regulates the services provided with the infrastructure and their prices; and controls any significant residual interest in the infrastructure. The operator does not recognize the PPE constructed as a part of the service concession arrangement. As per the service concession agreement, the operator is considered to have a right to access, rather than a right to use/right of ownership over the infrastructure asset. This right is recognized either as an intangible asset or a financial asset based on terms of the arrangement. Generally, service concessions under the Build Operate and Transfer (BOT) model are predominantly classified as intangible assets, whilst service concessions under the Hybrid Annuity Model (HAM) are classified as financial assets.

For accounting purposes, service concession arrangements are normally divided into two phases – construction phase and operations and maintenance phase.

During construction phase, the operator recognizes and measures revenue and costs related to the construction or upgrade of infrastructure, contracts. Hence, in the construction phase, the operator will generally recognize revenue as construction activity based on the value of the services performed (construction cost plus a fair margin).

If retrospective application of service concessions arrangement based on the above requirements is not practicable, a first-time adopter of Ind AS has an optional exemption to

- Recognize financial and intangible asset that existed at the transition date
- Use the previous GAAP carrying amount, no matter how they were previously classified; and
- Test the financial and intangible assets recognized at that date for impairment.

5.3 Revenue based Depreciation for Toll Roads

Indian GAAP allows revenue-based depreciation for toll roads created under a service concession arrangement. Ind AS prohibits use of revenue-based depreciation. Ind AS 101 and Ind AS 38 provide an option to continue with revenue-based amortization for toll roads recognized in financial statements for period immediately before the beginning of the first Ind AS financial statements. However, new toll roads constructed through subsequent service concessions would not be allowed to use revenue-based amortization, but rather be required to apply the amortization method based on the general requirements of Ind AS 38, i.e. straight-line method or written-down value method.

5.4 Financial instruments

- Interest free / subordinated loans

The holding company has to often provide what is known as subordinated loans to its subsidiaries which carry out the BOT agreements. These are

generally interest-free and have long tenure – ranging from 25–35 years.

All financial assets including assets such as interest free lease deposits, low interest or interest free loans, have to be fair valued at inception under Ind AS. The initial difference that arises from the fair valuation of such financial assets and liabilities is accounted for to reflect the substance of the underlying transaction. For example, the initial difference on fair valuation of interest free loans to subsidiaries would be considered as equity contribution from the holding company to the subsidiary and added to the overall cost of investment in equity shares of the subsidiary. The loan is subsequently accounted at amortized cost using effective interest method – resulting in recognition of interest income in P&L of the holding company's separate financial statements. Under Indian GAAP, there is no fair valuation required at the time of initial measurement.

The terms and conditions of subordinated loans may vary across entities. Based on the terms of the subordinate perpetual loan agreement, if the borrower at its discretion can defer the repayment of the loan indefinitely, it can be said that the loan can be only demanded by the lender upon liquidation of the Company after all the other loans and liabilities are duly repaid. If there is no interest obligation on the loan and if the loan is perpetual in nature, and if the borrower does not have any redemption obligation until upon liquidation, these may get classified as equity under Ind AS.

– **Financial guarantees**

Under Indian GAAP, financial guarantees issued in favor of bank on behalf of another company are not accounted for, unless they are invoked by the bank, and are disclosed as contingent liabilities.

Under Ind AS, financial guarantees issued in favor of bank on behalf of another company, for example, a subsidiary, are accounted for and are initially recognized and measured at fair value. Subsequently, the measurement is at the higher of: amount of loss allowance determined as

per impairment requirements of Ind AS 109, and amount initially recognized less, where appropriate, cumulative amortization. Alternatively, financial guarantee contracts may be regarded as insurance contracts, in which case, at the end of each reporting period the entity performs a liability adequacy test, i.e. it assesses the likelihood of a pay-out based on current undiscounted estimates of future cash flows), and any deficiency is recognized in profit or loss.

– **Preference shares**

Under Ind AS, the liability and equity classifications of financial instruments may change substantially. Redeemable preference shares, classified as part of equity under Indian GAAP, are treated as, partly or entirely, as debt under Ind AS. This is due to the nature of the instrument giving rise to redemption obligation at a future date. Such debt instruments are initially measured at fair value and subsequently amortized through P&L by booking finance cost. Dividend distribution tax payable on such debt instruments are charged to P&L as finance cost.

– **Expected credit loss model**

Under Indian GAAP, there was no detailed guidance on methodology for determining the impairment of financial assets, such as loans and receivables. Ind AS introduces a new 'expected credit loss' (ECL) model for impairment of financial assets. This model requires more forward-looking information to recognize either a 12-month or a lifetime expected credit losses. Consequentially, provision for bad debts no longer depends on a company identifying a credit loss or a default event. Rather, a company always estimates an 'expected loss' considering a broader range of information including past events such as, historical loss trend for similar assets; current economic and trade conditions; and reasonable and supportable forecasts that affect the expected collectability of the future cash flows of the financial instruments.

5.5 Accounting for Negative Grants/ NHAI premium

Certain arrangements include the provision for negative grants, wherein the operator is required to make the payment to the grantor during the duration of the arrangement. Negative grant may be either in the form of fixed payment (upfront or annual throughout the service concession arrangement) or in the form of a percentage of revenue earned during the arrangement.

According to Ind AS, a company is required to evaluate whether upfront fixed payment should be treated as an intangible asset given that it is paid towards getting the right to earn revenues by running the infrastructure and in case of annual fixed payment, whether to recognize intangible assets by crediting the liability with present value of the annual amounts payable during service concession arrangement.

5.6 Government grant

Under Indian GAAP, Government grants in the nature of promoter's contribution were to be credited directly to the shareholders' funds (reserves). Grants related to depreciable assets were either treated as deferred income and transferred to the P&L in proportion to the depreciation; or deducted from the cost of the asset. Ind AS does not permit recognition of grants directly in reserves. Therefore, Government grants will be recognized as income, on a systematic basis, over the periods necessary to match them with the related cost, which they are intended to compensate.

5.7 Leases

Indian GAAP does not provide explicit guidance on accounting for lease transactions which are embedded in purchase/sale arrangements. Such arrangements are generally recognized based on their legal form. Ind AS provides specific guidance for the identification of embedded leases. Once identified as a lease, the principles for classification and accounting of the embedded lease would be the same as other leases.

Under Ind AS 116 Leases, leasing would extend to arrangements which, in substance, meet the definition of a lease, even though not be structured as 'lease'. These arrangements convey a right to use an asset or assets for an agreed period of time in return for a payment or series of payments.

Under Ind AS 116 Leases, an entity evaluates if an arrangement qualifies to be a lease based on the criteria provided in the standard. A contract is, or contains, a lease if the contract conveys the right to control the use of an identified asset for a period of time in exchange for consideration. This may require significant judgment.

A lessee recognizes right-of-use asset representing its right to use the underlying asset for the lease term at the lease commencement date. The cost of the right-of-use asset measured at inception comprises of the amount of the initial measurement of the lease liability adjusted for any lease payments made at or before the commencement date less any lease incentives received, plus any initial direct costs incurred and an estimate of costs to be incurred by the lessee in dismantling and removing the underlying asset or restoring the underlying asset or site on which it is located. The right-of-use assets is subsequently measured at cost less any accumulated depreciation, accumulated impairment losses, if any and adjusted for any remeasurement of the lease liability. The right-of-use assets are depreciated from the commencement date over the shorter of lease term or useful life of right-of-use asset. The estimated useful lives of right-of-use assets are determined on the same basis as those of property, plant and equipment.

An entity measures the lease liability at the present value of the lease payments that are not paid at the commencement date of the lease. The lease payments are discounted using the interest rate implicit in the lease, if that rate can be readily determined. If that rate cannot be readily determined, an entity uses incremental borrowing rate. The lease liability is subsequently remeasured by increasing the carrying amount to reflect interest on the lease liability, reducing the carrying amount to reflect the lease payments made and remeasuring the carrying amount to reflect any reassessment or lease modifications or to reflect revised in-substance fixed lease payments.

The entity recognizes the amount of the re-measurement of lease liability as an adjustment to the right-of-use asset. Where the carrying amount of the right-of-use asset is reduced to zero and there is a further reduction in the measurement of the lease liability, the entity recognizes any remaining amount of the re-measurement in statement of profit and loss.

An entity may elect not to apply the requirements of Ind AS 116 to short-term leases of all assets that have a lease term of 12 months or less and leases for which the underlying asset is of low value. The lease payments associated with these leases are recognized as an expense over the lease term.

6.1 Background

Every entity earning Income in India is required to determine taxability of income earned in accordance with provisions of the Income-tax Act, 1961 ("IT Act"). The IT Act is said to be the one of the most complex income tax laws in the world.



The Government, each year as part of its annual budget exercise, brings about several amendments in the IT Act through the Finance Act. Recently, there has been thrust from the Finance Ministry to incentivize the investment in infrastructure sector. Government in its Union Budget 2021-22 announced that National Infrastructure Pipeline (NIP) which was launched in December 2019 with 6,835 projects has now expanded to 7,400 projects. Around 217 projects worth INR 1.10 lakh crores have been completed.

Further, it has been announced to set up Development Financial Institution (DFI) to act as a provider, enabler and catalyst for infrastructure financing and a sum of INR 20,000 crores has been provided to capitalize this institution. The aim is to have a lending portfolio of at least INR 5 lakh crores for this DFI in 3 years' time.

The tax rate was 30% for companies having turnover exceeding INR 400 crores (effective maximum tax rate 34.944%) and 25% for companies having turnover upto INR 400 crores (effective maximum tax rate 29.12%). Such high tax rate combined with slowdown in economic growth discouraged fresh investments in the economy. To boost investments and rationalize the corporate tax rate, the government has reduced the corporate tax rates significantly for certain domestic companies to 22% (effective maximum tax rate 25.17%) and for certain domestic manufacturing companies to 15% (effective maximum tax rate 17.16%) by insertion of section 115BAA and section 115BAB in the IT Act vide The Taxation Laws (Amendment) Act 2019, applicable from Financial Year 2019-20 (i.e. assessment year 2020-21).

In this chapter, we have covered the newly introduced sections 115BAA, section 115BAB, the existing corporate tax rates, certain tax incentives, ICDS, TDS applicability and key challenges, which are relevant for the infrastructure sector in India.

6.2 Introduction of Section 115BAA and Section 115BAB

Sections 115BAA and 115BAB were inserted by the Taxation Laws (Amendment) Act 2019 with effect from Financial Year 2019–20. The domestic companies opting for the concessional tax regime provided under section 115BAA or section 115BAB, need to exercise the option by filing the Form No. 10–IC / Form No. 10–ID before the due date for filing return u/s 139(1). Once such option is exercised, it would be applicable for subsequent years as well and cannot be withdrawn.

6.2.1 Section 115BAA

Section 115BAA provides for lower tax rate of 22% (plus applicable surcharge at 10% and cess at 4%) to certain domestic companies other than those mentioned in Section 115BA and 115BAB. In effect, there is a reduction in the base rate of corporate tax to 22% (effective maximum tax rate 25.17%) subject to the condition that such companies will not avail any deduction. In case the option under Section 115BAA is not availed by the assessee, the current base tax rate (excluding surcharge and cess) is 30% (effective maximum tax rate 34.944%) for companies having turnover exceeding INR 400 crores and 25% (effective maximum tax rate 29.12%) for companies having turnover up to INR 400 crores.

6.2.2 Section 115BAB

Section 115BAB provides for base tax rate of 15% (plus applicable surcharge at 10% and cess at 4%) for domestic manufacturing companies other than those covered in Section 115BA and 115BAA. The said section also provides for the taxation of other specified incomes at such rates as mentioned below (excluding any surcharge and cess):

Nature of Income	Rate of Taxation
Short Term capital gain on any capital asset which is not subject to depreciation	22%
Any profits derived over and above the reasonable profits determined by the Assessing Officer pertaining to transfer pricing	30%
Any income which is not derived from nor is incidental to any manufacture or production of an article or a thing which is not subjected to a specific rate of tax	22% (Note: This rate of taxation would be subject to no other allowance or deduction to be provided under any other provisions of the Act)

Any business transactions entered into by the company opting for concessional tax regime u/s 115BAB of the Act would be considered as a specified domestic transaction u/s 92BA of the Act and thus subjected to Transfer pricing rules and regulations.

The conditions for availing Section 115BAB are:

- i. Company has been set up and registered on or after October 1, 2019 and has commenced manufacturing on or before March 31, 2023.
- ii. The business should not be formed by splitting up, reconstruction of a business already in existence or it should not use machinery or plant previously used for any purpose or does not use any building previously used as a hotel or a convention centre as the case may be. (Refer Note a below)
- iii. Company is not engaged in any business other than the business of manufacture or production of any article or thing and research in relation to distribution of, such article or thing manufactured or produced by it. (Refer Note b below)

Note:

- a. Usage of any Machinery or Plant or any part thereof previously used for any purpose is put to use by the company and the total value of such machinery or plant or part thereof does not exceed 20% of the total value of machinery or plant used by the company would be treated as compliance with the provision. Usage of Imported Plant / Machinery, not previously used in India, is permitted.
- b. The business of manufacture or production would not cover development of computer software in any form or in any media, mining, conversion of marble blocks or similar items into slabs, bottling of gas into cylinder, printing of books or production of cinematograph film or any other business as would be notified by the Central Government from time to time.

6.2.3 Certain Deductions which cannot be claimed.

When the section 115BAA or 115BAB are opted for, then the following deductions cannot be claimed:

- Section 10AA (deduction for exports by SEZ units)
- Section 32(1)(iia) – Additional Depreciation allowance
- Section 32AD – Deduction for investment in new plant and machinery in notified backward states
- Section 33AB– Tea/Coffee/Rubber Development allowance
- Section 33ABA – Site restoration fund
- Section 35AD – Deduction in respect of specified business
- Section 35(1)(ii), (iia), (iii) and Section 35(2AA), (2AB) – Certain scientific research expenditure

- Section 35CCC – Expenditure on agricultural extension project
- Section 35CCD – Expenditure on skill development project
- Deduction under Chapter VIA other than section 80JJAA (deduction in respect of employment of new employees) and 80M (deduction in respect of the inter-corporate dividends).

Note:

- a. No set off of any loss carried forward from earlier year shall be allowed, if such loss is attributable to any of the deduction mentioned above. The said carried forward losses would be deemed to have already been given full effect to and no further deduction would be allowed for such loss for any subsequent year. Such restrictions would also be extended on losses which are taken over by the company by way of amalgamation or demerger u/s 72A of the IT Act.
- b. Any unit established in the International Financial Services Centre (IFSC) would be entitled to claim deduction u/s 80LA of the Act while opting for the concessional tax rate regime as per Section 115BAA provided other conditions in the said section are fulfilled by it.
- c. Any depreciation allowance in respect of a block of assets reflected in the books as on 01.04.2019 shall be correspondingly adjusted to satisfy the conditions as mentioned in the sections 115BAA and 115BAB of the Act.

6.2.4 Non-Applicability of MAT provisions

Minimum Alternative Tax (MAT) provisions shall not be applicable with respect to companies opting for the lower rate of tax u/s 115BAA or 115BAB of the Act. Further, once the company opts for the taxation u/s 115BAA, the MAT credit brought forward shall lapse and shall not be available for adjustment. As there is no timeline within which option under section 115BAA can be exercised, a domestic Company having credit of MAT may, if it so desires, exercise the option after utilizing the said MAT credit against the regular tax payable under taxation regime

existing prior to promulgation of the Taxation Amendment Act.

It may be pointed out that MAT is currently applicable @ 15% (excluding surcharge and cess) on book profits computed in specified manner. It is notable that companies which want to avail of deductions (such as section 10AA / Profit linked deductions under chapter VIA, etc.) and continue under the earlier tax regime, shall be subject to reduced MAT at 15% (plus applicable surcharge and cess).

6.2.5 Feasibility of the Option

Any company which is contemplating to avail the benefit of section 115BAA needs to critically examine the taxability under existing provisions vis-à-vis new tax regime, particularly if such company is historically paying taxes under MAT and carrying MAT credit in the books of accounts and tax returns. There may be situations wherein tax arbitrage provided by new regime may not be available in comparison to existing provisions depending on quantum of MAT credit available, time limit available to claim MAT credit, operational aspect and taxability in near future years, etc. Similarly, companies having brought forward losses on account of claiming additional depreciation should also analyze if it is beneficial to shift to the new concessional tax rate. Companies need to analyze the positions on proactive and timely manner before opting for new tax regime as once such option is exercised; it would be applicable for subsequent years as well and cannot be withdrawn. Further, the company needs to exercise such option before due date for filing return u/s 139(1) for any assessment year.

6.3 Existing Corporate Tax Rates if Sec 115BAA and Sec 115BAB are not applicable

In case of any failure in the satisfaction of the conditions (discussed in detail below) u/s 115BAA or 115BAB of the IT Act, the company would not be entitled to avail the benefit of the lower tax rate not only in the year of non-compliance but also for all the subsequent years. Also, in such a case, the provisions of the IT Act would apply as if no such option u/s 115BAA or 115BAB of the IT Act has been exercised by the company.

Any company which is not able to satisfy any of the conditions as mentioned in

Section 115BAA of the Act may still opt for concessional tax regime u/s 115BAB of the Act and vice versa. However, in case of non-applicability of both the said sections, the existing corporate tax rates would be applicable in such a case.

Each year, the Finance Act provides for income tax rates that shall apply to various assessees under the IT Act. In order to encourage body corporates, the finance minister reduced the tax rate of domestic company with annual turnover or gross receipts not exceeding INR 400 crore in FY 2019–20 at 25% [plus applicable surcharge and cess thereon] in the Finance Act, 2021.

6.3.1 The effective tax rates and MAT rates for Assessment Year 2022–23 in case of domestic companies with annual turnover or gross receipts exceeding INR 400 crore (in FY 2019–20) are tabulated below:-

Income slab	Effective Tax Rates	Effective Minimum Alternate Tax (MAT) Rates
Having total income exceeding INR10 crores	34.944% [(tax rate 30% plus surcharge 12% thereon) plus health and education cess 4% thereon]	17.472% [(tax rate 15% plus surcharge 12% thereon) plus health and education cess 4% thereon]
Having total income exceeding INR1 crore but not exceeding INR10 crores	33.384% [(tax rate 30% plus surcharge 7% thereon) plus health and education cess 4% thereon]	16.692% [(tax rate 15% plus surcharge 7% thereon) plus health and education cess 4% thereon]
Having total income up to INR 1 crore	31.20% (tax rate 30% plus health and education cess 4% thereon)	15.60% (tax rate 15% plus health and education cess 4% thereon)

Marginal relief is available to ensure that the additional income–tax payable, including surcharge of 7% on the excess of income over INR 1,00,00,000, is limited to the amount by which the income is more than INR 1,00,00,000.

Similarly, marginal relief is available to ensure that the additional income–tax payable, including surcharge of 12% on the excess of income over INR 10,00,00,000, is limited to the amount by which the income is more than INR 10,00,00,000. However, no marginal relief shall be available in respect of the health

and education cess.

6.3.2 The effective tax rates for Assessment Year 2022–23 in case of foreign companies are tabulated below:

Income slab	Foreign Company
Having total income exceeding INR10 crores	43.68% [(tax rate 40% plus 5% surcharge thereon) plus health and education cess 4% thereon]
Having total income exceeding INR1 crore but not exceeding INR10 crores	42.432% [(tax rate 40% plus 2% surcharge thereon) plus health and education cess 4% thereon]
Having total income up to INR 1 crore	41.60% [tax rate 40% plus health and education cess 4% thereon]

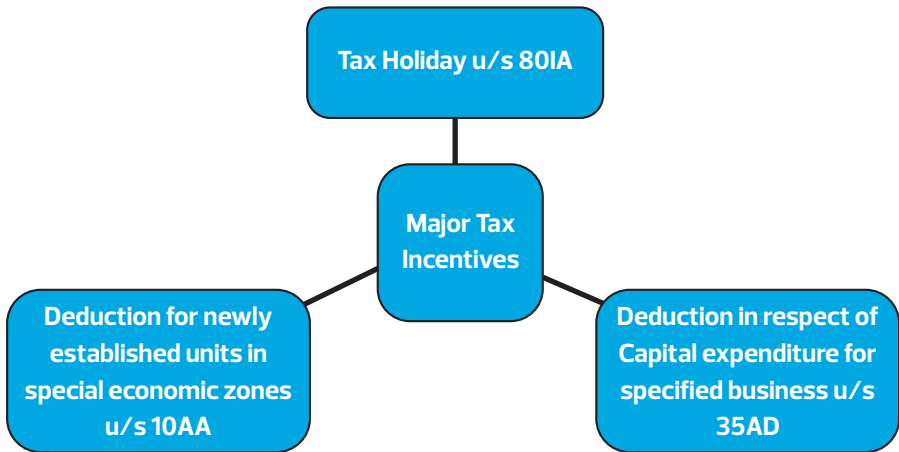
Marginal relief is available to ensure that the additional income–tax payable, including surcharge of 2% on the excess of income over INR 1,00,00,000, is limited to the amount by which the income is more than INR 1,00,00,000.

Similarly, marginal relief is available to ensure that the additional income–tax payable, including surcharge of 5% on the excess of income over INR 10,00,00,000, is limited to the amount by which the income is more than INR 10,00,00,000. However, no marginal relief shall be available in respect of the health and education cess.

6.4 Tax incentives

The IT Act provides several investment–linked allowances, tax holidays and deductions in respect of certain expenditure to entities in infrastructure sector. However, the Finance Minister in his Budget Speech, 2015 announced intention of corporate tax rate reduction from 30% to 25% over 4 years along with corresponding phasing out of exemptions and deductions. In line with the same, CBDT has outlined the road map and had proposed that profit linked, investment linked, and area–based deductions will be phased out for both corporate and non–corporate taxpayers and that sunset dates provided in the Act will not be

extended.



In this section, we have briefly covered the various tax incentives available to companies in this sector.

6.4.1 Tax Holiday –

A company engaged in eligible business is eligible to enjoy a tax holiday (i.e.100% of the profits derived from such business are allowed as deduction) under section 80IA for a period of any 10 consecutive assessment years out of 20 / 15 years beginning from the year in which the company begins operations.

This incentive is available to

- (i) Any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely: –
 - a) it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;

- b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;
- c) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April 1995:

For the purposes of this clause, "infrastructure facility" has been defined as—

- (a) a road including toll road, a bridge or a rail system;
 - (b) a highway project including housing or other activities being an integral part of the highway project;
 - (c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;
 - (d) a port, airport, inland waterway, inland port or navigational channel in the sea;
- (ii) Any undertaking which starts providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service or network of trunking, broadband network and internet services on or after 1 April 1995 but before 31 March 2005. Deduction shall not be available to a person executing the above referred services as a works contract. [First 5 years -100% deduction and next 5 years – 30% deduction]
 - (iii) Any undertaking which begins to develop or develops and operates or maintains and operates an industrial park which has commenced operations during 1 April 1997 to 31 March 2011. Deduction shall not be available to person executing the above referred services as a works contract.
 - (iv) An undertaking which, —

- a) is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April 1993 and ending on the 31st day of March 2017;
- b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on the 1st day of April 1999 and ending on the 31st day of March 2017:

Provided that the deduction under this section to an undertaking under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution;

- c) undertakes substantial renovation and modernization of the existing network of transmission or distribution lines at any time during the period beginning on the 1st day of April 2004 and ending on the 31st day of March 2017.

Explanation.– For the purposes of this sub-clause, “substantial renovation and modernization” means an increase in the plant and machinery in the network of transmission or distribution lines by at least fifty per cent of the book value of such plant and machinery as on the 1st day of April 2004;

However, w.e.f. 1 April 2017, this tax holiday has been phased out.

Accordingly, no profit-linked deductions will be available to an enterprise which commences the eligible business on or after 1 April 2017. Also, this incentive cannot be availed by a person if it is opting for concessional tax regime under section 115BAA or sec 115BAB.

6.4.2 Deduction in respect of newly established units in special economic zones –

Section 10AA of the IT Act makes special provisions in respect of newly established units in Special Economic Zones. A taxpayer setting up such a unit is

entitled to exemption from income tax for a period of fifteen years from the year of commencement of operations by such a unit, in the following manner:

- 100% of profits earned from the export of goods or services for a period of first five years;
- 50% of such profits for next five years; and
- 50% of such profits for further five years

subject to re-investment of profits in the business of the taxpayer in prescribed manner;

However, certain general conditions must be satisfied before a taxpayer becomes entitled to this deduction, viz.

- The unit should be set up in a notified Special Economic Zone;
- The unit should not be formed by splitting up or by reconstruction of a business already in existence; and
- The unit should not have been formed by the transfer of a new business of machinery or plant previously used for any purpose.

W.e.f. 1 April 2017, this tax holiday has been phased out. Accordingly, no deductions will be available to an enterprise commencing manufacture or production of article or thing on or after 1 April 2021. This incentive cannot be availed by a person if it is opting for concessional tax regime under section 115BAA or sec 115BAB.

6.4.3 Deduction u/s 35AD

Deduction in respect of capital expenditure incurred by an assessee for purpose of a specified business is fully deductible under section 35AD of the IT Act subject to fulfillment of certain conditions in this regard. Commencement of business operations in the nature of developing, operating and maintenance of any infrastructure facility on or after 1 April 2017 is also considered as specified business and thus eligible for deduction under this section.

Further, there are several provisions in the IT Act which disallow and restricts cash transaction and provides for allowability on payment or receipt only through account payee cheque, account payee draft or electronic clearing system through a bank account. Section 35AD of the IT Act provides that any expenditure in respect of which payment or aggregate of payments made to a person in a day, otherwise than by account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed, exceeds INR 10,000, then no deduction shall be allowed under section 35AD.

The deduction already claimed and allowed u/s 35AD will not be allowed under any other section.

Moreover, the asset against which deduction is claimed under section 35AD should also be used exclusively for the specified business for a period of 8 years commencing from the previous year in which the asset is acquired.

Further, in case any loss is computed in respect of such business, the said loss can be set off only against profits or gains from any other specified business and in case such loss is not wholly set off, it may be carried forward indefinitely to subsequent assessment years to be set off against gains from any other specified business in that assessment year. This is in accordance with Section 73A of the IT Act.

In case of the assets, in relation to which whole or part of its cost has been allowed as a deduction u/s 35AD are transferred by slump sale, the value of such assets shall be taken as NIL for the purpose of computation of capital gains.

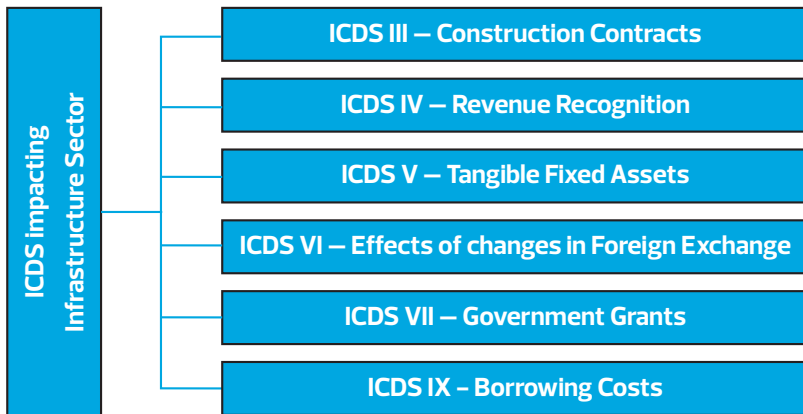
6.5 Chargeability of Income

Section 145 of the IT Act provides that the income chargeable under the head "Profits and gains of business or profession" and "Income from other sources" shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. Further, this section also empowered the Central Government to notify Income Computation and Disclosure

Standards (ICDS) for the purpose of computation of "Profits and gains of business or profession" and/or "Income from other sources" for all the assessee or for any class of assesses (except individuals and HUF not liable to tax audit).

Accordingly, the Central Government notified 10 ICDS to be followed by assesses to determine income chargeable to income tax for a particular year. The ICDS do not require maintenance of separate set of books of accounts and are only meant for computation of total income under normal provisions of the IT Act. The ICDS have been made applicable w.e.f. AY 2017-18 and are now embedded within the IT Act.

In the following paragraphs we have discussed the ICDS which may have an impact to the computation of taxable income of companies in the infrastructure sector.



6.5.1 ICDS impact on infrastructure sector

- ICDS III – Construction Contracts

The ICDS requires recognition of contract revenue and contract costs based on percentage of completion method. This is also in accordance with AS -7 / Ind AS – 11.

- The contract revenue and contract costs are defined in the ICDS. As per para 9 & 10 of the ICDS, contract revenue shall also include retention moneys so long as there is a reasonable certainty of its ultimate collection. This position is now affirmed by new section

43CB of the IT Act. Accordingly, several judicial decisions, wherein it was held that retention money is taxable only in the year in which the conditions for release of retention money are met, would no longer apply.

- Para 12 defines Contract costs. It states that "These costs shall be reduced by any incidental income, not being in the nature of interest, dividends or capital gains, that is not included in contract revenue." This position is also now affirmed with the introduction of section 43CB. Therefore, now any incidental income of the aforesaid nature shall be taxable under the head Income from Other Sources.
- AS-7 follows principle of prudence and thus requires recognition of expected losses. However, ICDS III does not prescribe recognition of expected losses. ICDS I on accounting policies also state that expected losses shall not qualify as a deduction unless otherwise specifically permitted under any ICDS. Thus, only actual losses are allowable under the ICDS.
- It is important to note that as per the transitional provisions of ICDS III, this ICDS shall apply only in case of construction contracts which have commenced on or after 1 April 2016. Also, the said ICDS is not applicable to real estate developers.

– **ICDS IV – Revenue Recognition**

- ICDS IV governs recognition of revenue from sale of goods, rendering of services and income in the nature of interest, royalty and dividend.
- This ICDS requires recognition of revenue from service contracts as per percentage of completion method. Except where the duration of contract is not more than 90 days, completed contract method is permitted. Also, if service is spread through indeterminate number of acts over a specified period of time, straight line method is permitted.
- ICDS IV also provides for recognition of discount / premium on debt

securities, and it states that such discount / premium shall be allowable / taxable over the period to maturity of the instrument.

- **ICDS V – Tangible Fixed Assets**

- ICDS V provides criteria of recognition of tangible fixed assets. The provisions of ICDS V are similar to that prescribed by regular accounting standards followed by entities. Some of the deviations are highlighted below.
- Under AS 10 as well as Ind AS 16, cost includes the initial estimate of the costs of dismantling and removing the item and restoring the site on which it is located. However, under this ICDS, in the components of cost such estimated costs of dismantling and removing the item and restoring the site are not included. Such expenditure cannot be considered as expenditure directly attributable in making the asset ready for its intended use. Accordingly, if such expenses have been considered as part of the cost of the fixed asset in the books of account these may be reviewed, and adjustment should be made while computing the total income.
- The Accounting Standards provide that in case the payment for fixed assets is beyond the normal credit terms, the difference between the cash price equivalent and the total payment is to be recognized as interest over the period of credit, unless such interest is capitalized in accordance with AS 16 or Ind AS 23. However, such bifurcation of cost is to be ignored for the purpose of this ICDS. Accordingly, interest debited to the profit and loss account out of the price to be paid for such asset should be reduced from the interest and the entire cost of such asset including such bifurcated interest should be added to the respective block of assets.
- Expenditure incurred on test runs, experimental production, start up and commissioning of a project are required to be capitalized as per para 8 of this ICDS. There have been conflicting judicial rulings relating

to allowability of depreciation from the date of commencement of trial production to the date of commencement of commercial production, and as to whether trial production costs are revenue expenditure or to be capitalized. According to this ICDS, such costs incurred during trial production stage, will need to be capitalized, and cannot be claimed as revenue expenditure. Even the costs incurred after trial runs but before commercial production begins are to be capitalized as clarified by the CBDT circular.

– **ICDS VI – Effects of changes in Foreign Exchange Rates**

- This particular ICDS deals with foreign currency transactions, financial statements of foreign operations and forward exchange contracts.
- The provisions of ICDS relating to initial recognition of foreign currency monetary and non-monetary items, conversion and exchange fluctuation gain / loss arising therefrom are subject to section 43A and Rule 115 of the IT Act and rules respectively.
- The provisions of section 43A are applicable only in a situation where the assessee has acquired assets from outside India. It does not apply to a situation where an assessee has acquired an asset in India funded by a foreign currency loan. ICDS VI and newly introduced section 43AA make it fairly clear that exchange gain / loss on such foreign currency loan is to be treated as either income or loss, as the case may be. It is pertinent to note that ICDS VI refers to monetary and non-monetary items and makes no distinction between capital and revenue items.
- In respect of entities having foreign operations, all transactions of such foreign operations shall be treated as integral, unlike AS - 11 where the entity have an option to treat foreign operations as integral or non-integral.
- Thus, if an entity is recognizing transactions of foreign operations as

per non-integral method and accumulating exchange difference in FCTR, such exchange difference will now have to be recognized as income or expenditure, as the case may be, in the computation of income. The CBDT has further clarified that FCTR balance as on 1 April 2016 pertaining to exchange differences on monetary items for non-integral operations, shall be recognized in the previous year relevant for assessment year 2017-18 to the extent not recognized in the income computation in the past.

- In respect of forward exchange contracts (other than those held for trading and speculation purpose), premium / discount is to be amortized over the life of the contract. This provision of ICDS is similar to the accounting standards.
- This ICDS also provides that premium, discount or exchange difference on derivative contracts that are intended for trading or speculation purposes, or that are entered into to hedge the foreign currency risk of a firm commitment, or a highly probable forecast transaction shall be recognized at the time of settlement. Hence, MTM loss / gain on such contracts shall not be allowed to be recognized any more.

- **ICDS VII – Government Grants**

- A Government grant, subsidy, duty drawbacks, waivers, concessions are considered as income in the year of receipt, if not taxed earlier. This is also included in newly introduced section 145B r.w.s. 2(24)(xviii) of the IT Act.
- Ind AS 20 does not permit reduction of the carrying amount of an item of property, plant and equipment by the amount of Government grant received in respect of such an item and corresponding reference in Ind AS 16 has therefore been removed.
- Therefore, where in financial statements drawn in compliance with

Ind AS 16 if any Government grant relating to an item of property, plant and equipment has been credited to the profit and loss account then, while computing the total income, amount of such grant should be excluded, and the amount should be reduced from corresponding block of assets.

- **ICDS IX – Borrowing Costs**

- This ICDS provides for recognition, borrowing costs eligible for capitalization, commencement of capitalization and cessation of capitalization.
- The definition of borrowing cost includes commitment charges on borrowings, and discounts or premiums related to the borrowings. It needs to be noted that so far as discounts or premiums relating to borrowings, and ancillary costs incurred in connection with the arrangement of borrowings, only the amortized amount is to be considered as borrowing costs, and not the entire amount of discount, premium or ancillary costs. In effect, therefore, the ICDS covers only deferred expenditure for the purposes of capitalization, if such expenditure is deferred.
- As per Para 5 of this ICDS, actual borrowing costs incurred during the period on the funds borrowed is to be capitalized until the qualifying asset is first put to use, whereas accounting standard allows deduction of income arising on temporary investment of borrowed funds from the total borrowing cost to be capitalized. Hence, now such income on temporary deployment of unutilized borrowed funds shall be taxable under IFOS.
- ICDS is to be abided by every assessee to whom these standards are applicable. Even though there are favorable judicial precedents on some issues, most of them have been rendered ineffective by introduction of ICDS and consequent amendment in the Act. The above are some general issues that may be faced by entities while

applying ICDS. These must be kept in mind at the time of computing taxable income.

- A question may now arise as to whether the provisions of ICDS having adverse impact on taxable income which have not been embedded in the IT Act and for which judicial precedents are favorable can be challenged?

6.6 Certain specific deductions available to infrastructure companies under the IT Act

- Certain specified preliminary expenses incurred at the time of commencement of business or after commencement, in connection with extension of the undertaking or setting up of a new unit is allowed as a deduction over a period of 5 years from date of commencement of business / new unit as per section 35D of the Act.
- 30% of the additional employee cost (total emoluments payable to additional employees employed during the year) incurred by an assessee having income under the head PGBP shall be allowed for 3 assessment years including the year in which employment is provided subject to certain conditions specified in section 80JJAA of the IT Act.
- For companies engaged in business of sanitation and urban waste management, deduction under section 80JJA is available under the IT Act. As per the said section, an assessee engaged in the business of collecting and processing or treating of bio-degradable waste for generating power or producing bio-fertilizers, bio-pesticides etc. or for making organic manure shall be allowed deduction of 100% of profits from such business for 5 consecutive assessment years beginning from assessment year in which such business commences.

6.7 Zero coupon bonds issued by infrastructure debt funds

- In Union Budget, 2021-22, the GOI announced that in order to allow funding of infrastructure by issue of Zero Coupon Bonds, notified Infrastructure Debt Funds shall be eligible to raise funds by issuing tax efficient Zero

Coupon Bonds. Such funds will be notified in the Official Gazette.

- Section 194A of the Act was also amended to provide that TDS shall not be applicable on such income which is paid or payable by an infrastructure debt fund in relation to Zero Coupon Bonds issued by such fund.
- Zero Coupon Bonds are issued at heavy discount and no interest is paid during the tenure of the bonds. The gain on redemption of bonds (i.e. the difference between the redemption price / face value and issue price) is taxed as capital gain. If the zero coupon bonds are held for more than 12 months, then the gain will be long term capital gain and if held for less than 12 months then the gain will be short term capital gain.
- Further, as per the proviso to section 112(1) of the Act, the long term capital gain shall be taxed at the lower of 20% with indexation or 10% without indexation.

6.8 TDS implications

The TDS provisions of the IT Act are stringent. Non-compliance thereof may lead to levy of interest, penalties and result in prosecution. Some important provisions of the IT Act related to deduction of tax at source that may be attracted in respect of transactions undertaken by entities in infrastructure sector are listed below.

	194C-TDS on Payment to contractor /sub-contractors	194J-TDS on Professional Fees	194LBA-TDS on Income from business trust	194LC-Concessional TDS on interest to NRIs by company /business trust	194Q-TDS on purchase of goods
Nature of payment	Payment of works contract made to contractor	Any sum paid by way of: a) Fee for professional services	Any Income distributed by business trust to its unit holders	Payment of interest by an Indian Company or a business	Payment to any resident for purchase of any goods

	194C-TDS on Payment to contractor /sub-contractors	194J-TDS on Professional Fees	194LBA-TDS on Income from business trust	194LC-Concessionary TDS on interest to NRIs by company /business trust	194Q-TDS on purchase of goods
	or sub-contractor	b) Fee for technical services c) Royalty d) Remuneration / fee/ commission to a director or e) For not carrying out any activity in relation to any business f) For not sharing any know-how, patent, copyright etc. shall be treated as professional fees.	as referred to in section 115UA being of nature referred to in section 10 (23FC).	trust in respect of money borrowed in foreign currency under a loan agreement or by way of issue of long-term bonds (including long-term infrastructure bond)	
Person responsible to deduct tax	Any person carrying out any work in	Any person responsible for paying to resident.	Business Trust	Indian Company or a business trust	Any person whose total sales, gross receipts or turnover from

	194C-TDS on Payment to contractor /sub-contractors	194J-TDS on Professional Fees	194LBA-TDS on Income from business trust	194LC-Concessional TDS on interest to NRIs by company /business trust	194Q-TDS on purchase of goods
	pursuance of a contract between a specified person and the resident contractor				the business carried on by him exceed INR 10 crore during the financial year immediately preceding the financial year in which the purchase of goods is carried out
Rate	- Payment made to HUF/Individuals- 1% - Payment made to others- 2%	2% in case of fees for technical services 10% in other cases irrespective of the payee;	10% if payment made to resident 5% if payment in the nature of interest made to non-resident	5% rate is applicable on payment made to NRIs	0.1% irrespective of the payee

	194C-TDS on Payment to contractor /sub-contractors	194J-TDS on Professional Fees	194LBA-TDS on Income from business trust	194LC-Concessional TDS on interest to NRIs by company /business trust	194Q-TDS on purchase of goods
Threshold limit	Rs 30,000/- for single payment and 100,000/- in aggregate financial year	Rs 30,000 for a financial year. (no limit is applicable to director's fees)	No threshold limit is prescribed.	No threshold limit is prescribed.	Purchase of goods exceeding INR 50 Lakhs from a single buyer

6.9 Key Challenges faced by infra sector in recent times

6.9.1 Sunset clause in profit-linked deductions

- The Government had committed to reduce the corporate tax rate over a period of 5 years; however the same was to be done by simultaneously withdrawing the exemption / profit linked deductions. Keeping its promise, the corporate tax rate for AY 2018-19 was reduced to 25% in Finance Act, 2018 for companies whose total turnover / gross receipts do not exceed INR 250 crores during FY 2016-17, threshold of which is further increased to total turnover / gross receipts up INR 400 crores. In order to strike balance and compensate for the loss of revenue due to the reduced rate, the Government has inserted a sunset clause for claiming profit-linked deductions.
- In view of the above, while the Government has reduced corporate tax rate

to 25% from 30% for certain companies, the deduction u/s 80-IA shall not be available to any entity which starts the development or operation and maintenance of the infrastructure facility on or after 1 April 2017. Also, entities that are set up for generation, transmission and distribution of power in India on or after 1 April 2017 shall no longer be entitled to profit-linked deduction u/s 80-IA. The entities already claiming such deduction can continue to avail benefit of this section till its expiry. Although, infrastructure projects are now eligible to claim investment-linked deduction u/s 35AD, no such deduction is available for power sector resulting in a cause of concern for tax expense of such companies. Also, the deduction under section 80-IA or section 35AD cannot be availed by a person if it is opting for concessional tax regime under sec 115BAA or sec 115BAB

- Further, shifting from profit-linked holiday to investment-linked incentive may cause a reduction in IRR for infrastructure companies.

6.9.2 Fiscal Consolidation

- Infrastructure companies, owing to legal or commercial requirements, are forced to have multiple subsidiaries i.e. separate SPVs for each project. This is primarily to meet the bid requirements and the financing arrangements for such projects.
- Due to existence of multiple SPVs under single parent company, one of the major challenges faced is significant cost incurred for undertaking regulatory compliances. Apart from enormous compliance efforts and cost to the taxpayer, it also results into significant administrative cost for tax department in keeping track of and assessing multiple SPVs. Under the current tax regime, each SPV is regarded as an independent tax entity and, therefore, required to undertake separate income-tax return filing.
- To avoid the above issues, many developed countries like USA, France and Australia have adopted tax consolidation regime which may create a positive impact on business as well as significant reduction in the

compliance and litigation cost. Group taxation would help to reduce the on-going tax litigation and administrative cost of the tax department as well.

- A tax consolidation regime can prove to be beneficial for both the government as well as taxpayers, creating a win-win situation for both. Under Consolidated group tax filling approach, a group of wholly owned or majority-owned companies are treated a single entity for tax purposes. This generally means that the parent company is responsible for the entire group's tax obligations. Under the approach, all the intragroup transaction in the group companies have no impact for taxation purposes and the tax obligations are required to be met by single parent entity and each SPV will not be required to undertake separate tax filing
- In case a fiscal consolidation provision is introduced, the same would eliminate the adverse tax impact on holding companies having to set up separate SPVs for each project as per the regulatory requirement.
- The life span of an SPV is generally short and business losses are allowed to be carried forward only for 8 assessment years. This may at times result in business losses remaining to be set off after the SPV is closed down.
- In the capital intensive sectors like infrastructure, introduction of such a progressive tax regime would be beneficial and fair to both the taxpayer as well as the government. The tax consolidation regime also endorses the Government's efforts of "Ease of doing business in India" and assist in aligning the business and tax objectives for the industry.

6.9.3 Thin Capitalization rules

- Section 94B was introduced via the Finance Act, 2017. As per this section the deduction for any expenditure by way of interest or of similar nature incurred (whether paid or payable) by an Indian company or a PE of a foreign company would be restricted to 30% of EBITDA in respect of debt borrowed from its non-resident associated enterprises; or third-party non-resident lender if an associated enterprise provides an implicit or explicit guarantee

to such lender.

- Interest expense up to INR 1 crore will not be impacted by the above provision. Further, the amount of interest expense disallowed shall be allowed to be carried forward for a period of 8 assessment years beginning from the assessment year in which such interest expenditure was first computed.
- The applicability of the thin-capitalization rules may increase the tax burden on various multinational infra groups' financing structures.
- The aforesaid provision is introduced in line with the OECD's BEPS Action plan. The OECD gave an option to jurisdictions to exclude, subject to certain conditions, interest paid to third party lenders on loans used to fund public-benefit projects as due to the nature of these projects and the close link to the public sector, the BEPS risk is reduced. However, such exclusion does not find place in Indian thin capitalization rules.

6.9.4 Secondary Adjustment

- The Finance Act, 2017 introduced the concept of secondary adjustment on Transfer Pricing (TP) adjustments. As per provisions of section 92CE, a taxpayer is required to make a secondary adjustment, where the primary adjustment to transfer price has been made in the following situations:-
 - Suo moto by the taxpayer in the return of income;
 - By the AO during assessment proceedings, and has been accepted by the taxpayer;
 - Adjustment determined by an Advance Pricing Agreement (APA) entered into by the taxpayer u/s 92CC;
 - Adjustment made as per the safe harbour rules under section 92CB;
or

- Adjustment arising as a result of resolution of an assessment by way of the mutual agreement procedure (MAP) under an agreement entered into under section 90 or section 90A for avoidance of double taxation.
- Further, the section 92CE(3)(v) defines 'Secondary adjustment' as an adjustment in the books of account of the assessee and its associated enterprise to reflect that the actual allocation of profits between the assessee and its associated enterprise are consistent with the transfer price determined as a result of primary adjustment, thereby removing the imbalance between cash account and actual profit of the assessee.
- The above requirements for repatriating the excess amount into India and imputing a notional interest are not triggered if the primary adjustment made in any previous year does not exceeds INR 1,00,00,000 or the primary adjustment is made in respect of an assessment year commencing on or before the 1 April 2016.
- Where, as a result of primary adjustment to the transfer price, there is an increase in the total income or reduction in the loss, as the case may be, of the assessee, the excess money, which is available with its associated enterprise, if not repatriated to India within the time as may be prescribed, shall be deemed to be an advance made by the assessee to such associated enterprise and the interest on such advance, shall be computed in such manner as may be prescribed.
- Further where the excess money or part thereof has not been repatriated within the prescribed time, the assessee may, at his opinion, pay additional income-tax at the rate of 18% on such excess money or part thereof, as the case maybe.
- The tax on the excess money or part thereof so paid by the assessee shall be treated as the final payment of tax and no further credit therefor shall be claimed by the assessee or by any other person in respect of the amount of tax so paid.

- No deduction shall be allowed to the assessee in respect of the amount on which tax has been paid.
- Where the additional income –tax is paid by the assessee, then he shall not be required to make secondary adjustment and compute interest from the date of payment of such tax.

6.9.5 Applicability of MAT even during tax holidays

- The very objective of granting tax holiday is to protect cash outflow on account of income tax during the initial critical period of development of infrastructure project. Levy of MAT on companies in infrastructure sector defies this very objective and neutralizes the benefit by way of cash outflow due to tax levied on book profits.
- Though, the companies now have an option to opt for new tax regime under section 115BAA or section 115BAB in which case MAT is not applicable but at the same time no tax holiday can be claimed if the new tax regime under section 115BAA or section 115BAB is opted for.

6.9.6 Taxability of Carbon Credits

- There is a computation mechanism whereby reduction in emission of one tonne of carbon dioxide or its equivalent gases is equivalent to one carbon credit. Entities are entitled to trade in credits earned from such reduction in carbon dioxide emissions with entities in countries subject to commitments under the Protocol, for a price arrived through set mechanism.
- Several judicial precedents had divergent views as to taxability of carbon credits. Some courts treat them as capital receipts whereas some others treat them as benefits or perquisites chargeable under PGBP. These controversies have been put to an end in view of amendment in the IT Act by way of introduction of section 115BBG.
- Section 115BBG is introduced w.e.f. AY 2018-19 bringing the carbon credits into tax net and taxing the same at a concessional rate of 10% on gross

basis.

- There has been no amendment to this effect in the definition of income and hence there is scope of litigation on this matter.

6.9.7 Section 79 – Carry Forward of Losses in case of change in shareholding

- Section 79 of the IT Act does not permit carry forward and set off of losses of a closely held company, if the shares of such company carrying at least 51% of voting power are not beneficially held by persons who beneficially held such shares on the last day of the previous year in which the loss was incurred. This section was introduced as an anti-abuse measure so that an entity does not purchase shares of any loss making companies only to obtain benefit of set-off of business losses.
- The question of whether any change in shareholding within group companies would be hit by section 79 has been a litigated at various levels.
- In the said case, some courts have adopted substance over form approach and allowed carry forward of losses when the ultimate parent company remains the same, whereas some other courts have refused to lift the corporate veil and disallowed carry forward of losses when registered shareholding undergoes a change.
- The uncertainty in relation to the interpretation of section 79 of the IT Act has a negative impact particularly on corporate restructuring and global M&A deals. With divergent views adopted by the Courts, it is now up to the Apex Court to bring rest to this controversy.

6.9.8 Expenditure on Build-Operate and Transfer (BOT) – Depreciation or Amortization?

- Under BOT projects, the developer, in terms of a concessionaire agreement with Government or its agencies is required to construct, develop and maintain the infrastructural facility for a specified period. In return the developer is granted right to collect toll from the users. Generally, the possession of the land is granted by the Government without any actual

transfer or any agreement.

- The issue whether the expenditure on BOT projects will be allowed as depreciation or amortization or as expenditure under section 37(1) has been a matter of debate before the court/tribunal.
- Different contentions held in judicial precedents are as follows:
 - The toll road would fall under the head 'building' and shall be eligible for depreciation at 10 per cent.
 - The entire cost of construction and development on BOT project is to be amortized evenly over the period of the agreement and allowed as business expenditure under section 37(1) of the Act. This is in accordance with the CBDT circular dated 23 April 2014 which is binding on tax authorities but not on assessee.
 - The cost incurred shall be treated as 'license/right to collect toll' and hence shall be classified as an Intangible asset and eligible for depreciation at 25 per cent.
- Further, the classification of such expenditure shall differ from the accounting perspective and accordingly the charge to profit and loss shall also vary from the Act. This mismatch shall impact MAT and Deferred Tax Asset/Liability calculations as well.
- A suitable amendment in the law may help clear the air regarding treatment of expenditure incurred on BOT projects and put an end to the prolonged litigation.

7.1 Background

InvITs is a comparatively new infrastructure financing model introduced in the year 2014. The objective of introducing InvIT is to provide a suitable structure of financing / refinancing of infrastructure projects in the country. Financing and structuring of InvITs is regulated by the SEBI (Infrastructure Investment Trusts) Regulations, 2014 as amended from time to time.

7.2 Salient Features of InvITs

7.2.1 InvITs shall be set up as a trust and the instrument of trust is in the form of a deed duly registered in India under the provisions of the Registration Act, 1908. The said Trust shall be registered with SEBI. It shall have parties such as Trustee, Sponsor(s), Investment Manager and Project Manager. The trustee of an InvIT shall be a SEBI registered debenture trustee who is not an associate of the Sponsor/Manager.

7.2.2 With regard to the sponsor(s), each sponsor shall have a net worth of not less than INR100 crore (in case sponsor is a company); or net tangible assets of value not less than INR 100 crore (in case sponsor is an LLP).

7.2.3 An InvIT shall hold or propose to hold controlling interest and not less than 51% of the equity share capital or interest in the underlying SPV, except where the same is not possible because of a regulatory requirement/ requirement emanating from the concession agreement. In such cases sponsor shall enter into an agreement with the InvIT, to ensure that no decision taken by the sponsor, including voting decisions with respect to the SPV, are against the interest of the InvIT / its unit holders.

7.2.4 Sponsor(s) of an InvIT shall, collectively, hold not less than 15% of the total units of the InvIT on post issue basis for a period of at least 3 years, except for the cases where a regulatory requirement/concession agreement requires the sponsor to hold a certain minimum per cent in the underlying SPV. In such cases, the consolidated value of such sponsor holding in the underlying SPV and in the InvIT shall not be less than the value of 15% of the value of units of InvIT on post-issue basis. Any holding by sponsor exceeding 15% on a post issue basis shall be held for a period of at least 1 year.

7.2.5 The proposed holding of an InvIT in the underlying assets shall be not less than INR 500 crore and the offer size of the InvIT shall not be less than INR 250 crores at the time of initial offer of units.

7.2.6 The aggregate consolidated borrowings of the InvIT and the underlying SPVs, net of cash and cash equivalents, shall not exceed 70% of the value of InvIT assets.

7.2.7 For borrowing by InvIT, net of cash and cash equivalents, above 25% and upto 49% of the value of InvIT assets, InvIT requires:

- i. To obtain credit rating from a credit rating agency registered with SEBI.
- ii. To seek approval of unitholders.

7.2.8 For borrowings above 49% of the value of InvIT assets, InvIT requires:

- i. Approval of 75% of unit holders.
- ii. AAA or equivalent credit rating of consolidated debt and project debt from a credit rating agency registered with SEBI.
- iii. Minimum track record of at least 6 distributions on a continuous basis post listing.
- iv. Utilize the funds only for acquisition or development of infrastructure projects.

Such InvIT shall also submit a quarterly report to the designated stock exchange within 30 days from the end of every quarter ending June and December.

7.2.9 The investment by an InvIT shall only be in the holding company and/ or SPVs or infrastructure projects or securities in India in accordance with SEBI regulations. InvITs shall invest in infrastructure projects, either directly or through SPV. In case of PPP projects, the InvIT shall mandatorily invest in the infrastructure project through holding company and/ or SPV.

7.2.10 Listing shall be mandatory for both publicly offered and privately placed units of InvITs and InvIT shall make continuous disclosures in terms of the listing agreement.

7.2.11 InvIT is mandatorily required to list on the recognized stock exchange within 12

working days from the date of closure of Initial Public Offer and trading lot for the purpose of trading of units on the stock exchange shall consist of 100 units.

- 7.2.12** If the InvIT raises funds by public issue either by way of Initial Public Offer or any subsequent issue of units after Initial Public Offer may be by way of follow-on offer, preferential allotment or any other mechanism, the minimum subscription from any investor in the above ways shall be INR 1 Lakh.
- 7.2.13** The InvIT shall redeem units only by way of a buy-back or at the time of delisting units.
- 7.2.14** The SPV shall distribute not less than 90% of its net distributable cash flows to the InvIT in proportion of InvIT holding in the SPV subject to applicable provisions of the Companies Act, 2013 or Limited Liability Partnership Act, 2008. The InvIT shall distribute not less than 90% of its net distributable cash flows to the Unit Holders.
- 7.2.15** The distributions shall be declared and made not less than once every 6 months in every financial year in case of publicly offered InvITs and not less than once every year in case of privately placed InvITs and shall be paid within 15 days from the date of such declaration.
- 7.2.16** The investment manager shall apply for delisting of units of InvIT to the Board and the designated stock exchanges, if:
- The public holding falls below the specified limit
 - The number of unit holders of the InvIT falls below the prescribed limit
 - If there are no projects or assets remaining under the InvIT for a period exceeding 6 months and InvIT does not propose to invest in any project in future
 - The Board or the designated stock exchanges require such delisting for violation of the listing agreement or the Regulations or the SEBI Act
 - The trustee and investment manager request for delisting which is approved by the unit holders, or the unit holders apply for delisting or the Board or the designated stock exchange require such delisting in the interest of the unit holders

7.2.17 The trustee and the Investment Manager of a privately placed and listed InvIT have an option to choose to convert InvIT to a privately placed unlisted InvIT and such request has been approved from not less than 90% of the unit holder by value.

7.2.18 The procedure for delisting of units of InvIT including provision of exit option to the unit holders shall be in accordance with the listing agreement and in accordance with procedure as may be specified by the Board and the designated stock exchanges from time to time.

7.3 Related Party Transactions:

7.3.1 All related party transactions shall be on an arms-length basis in accordance with relevant accounting standards, in the best interest of the unit holders, consistent with the strategy and investment objectives of the InvIT. Further, specific certification from a chartered accountant will be required for related party transactions in cases of conflict of interest. The onerous disclosure and compliance requirements will require the manager to ensure that all related party transactions are at arm's length and that the disclosures have been complied with.

7.3.2 As per the Regulations, "related parties of the InvIT" shall include parties to the InvIT; promoters, directors and partners of the aforementioned parties to the InvIT.

7.3.3 Detailed provisions for related party transactions, valuation of assets, disclosure requirements, rights of unit holders, etc. are provided in the Regulations.

7.4 Framework for Private Placement of units of InvIT which are not listed:

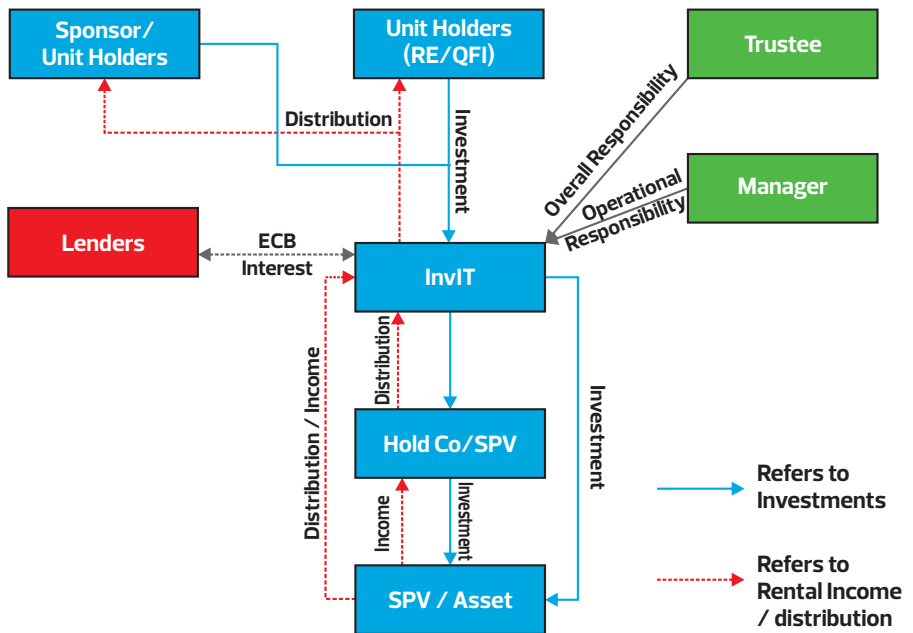
7.4.1 As per SEBI (Infrastructure Investment Trusts) (Amendment) Regulations, 2019 a new chapter was introduced "Framework for Private Placement of units of InvIT which are not listed". The key features are as follows:

- a) A separate framework for privately placed unlisted InvIT could be considered for raising of funds and investments. The framework could provide:
 - Relaxing the requirement of minimum number of investors i.e. 20 and also increasing the minimum investment limit but only from Institutional investors and body corporates.
 - Leverage could be determined by the issuer after consultation with

investors

- Relaxing the asset mix requirement by proposing to allow investment in completed or under construction infrastructure projects or both.
 - The minimum investment by an investor should not be less than INR 1 crore.
 - Invest not less than 80% of the value of the InvIT assets in eligible infrastructure projects either directly or indirectly through SPVs.
 - File the placement memorandum with the SEBI within a period of 10 days from the date of allotment of the units to the investors.
- b) A privately placed "unlisted" InvIT may choose to list its units on stock exchanges, after complying with the applicable requirements specified for a privately placed and listed InvIT in the manner specified by the SEBI.

7.5 Diagrammatic representation of a typical InvIT structure is illustrated below:



7.6 Tax Implications in the hands of different parties to InvIT

Nature of Income	SPV	InvIT	Sponsor(s)	Unit Holder
Exchange of shares in SPV with Units of Business Trust	NA	NA	Also, no MAT Implications	NA
Dividend	NA	Exempt (pass through)	Exempt, if SPV does not opt for lower tax regime of 22% u/s 115BAA If SPV has opted for lower tax regime u/s 115BAA, then taxable at applicable rates in the hands of the Sponsor, subject to DTAA in the case of non-residents	Exempt, if SPV does not opt for lower tax regime of 22% u/s 115BAA If SPV has opted for lower tax regime u/s 115BAA, then taxable at applicable rates in the hands of the unit holder, subject to DTAA in the case of non-residents
Interest	Interest expense deductible in hands of SPV No WHT obligations	Exempt (pass through)	Taxable at normal rates for residents and @ 5% for non-residents	Taxable at normal rates for residents and @ 5% for non-residents
Capital Gains on disposal of assets	20%-30% MAT provisions shall apply; If	Assets directly held by trust @ 20%-30%	NA	NA

Nature of Income	SPV	InvIT	Sponsor(s)	Unit Holder
	SPV has opted for lower tax regime u/s 115BAA, then MAT provisions not applicable	Sale of shares of SPV shall be taxable @ 20% or 15% No AMT implications		
Capital gains on transfer of Units	NA	NA	<ul style="list-style-type: none"> • LTCG – 10% (if STT paid and LTCG > 1 lac) • STCG – 15% (if STT paid) • MAT provisions shall apply; if opted for 115BAA, then MAT not applicable • For non-resident unit holders, rates would be subject to benefits of applicable DTAA 	<ul style="list-style-type: none"> • LTCG – 10% (if STT paid and LTCG > 1 lac) • STCG – 15% (if STT paid) • MAT provisions shall apply; if opted for 115BAA, then MAT not applicable • For non-resident unit holders, rates would be subject to benefits of applicable DTAA
Other Income of Business Trust	NA	MMR (34.50 %)	NA	NA

Nature of Income	SPV	InvIT	Sponsor(s)	Unit Holder
Withholding tax obligation for interest paid to Unit Holders	NA	10% if the unit holder is resident and 5% for non-resident	NA	NA
Withholding tax obligation for dividend paid	Withholding tax not applicable	10% Withholding tax is not applicable if the SPV has not opted for lower tax regime u/s 115BAA	NA	NA

Notes:

1. The rates specified in the above table are base rates and need to be increased by applicable Surcharge and Education Cess.
2. For the purpose of computing capital gains on subsequent sale of Units by the Sponsor(s), the cost of shares of the SPV would be considered as the cost of Units.
3. The holding period should be more than 36 months to qualify as long-term capital assets. While arriving at such holding period, the holding period of the shares of SPV shall also be included in holding period of such units.

8.1 Introduction:

The infrastructure sector is the backbone of the Indian economy. The government has been making efforts to boost the sector through various schemes and incentives. The infrastructure sector consists of various segments such as roads, highways, power, commercial and social infrastructure like hospitals, educational institute, malls, etc. Each of these segments is governed by different indirect tax provisions.



In the pre-GST era, there were various contradictions in the indirect tax applicability and incidence as relevant to infrastructure sector. While Central laws provided exemptions and concessions specific to services, state VAT (value-added tax) and entry tax laws were applicable to goods procured. There was litigation at the Centre and State levels on classification of contracts as goods or services, taxable value, jurisdiction of state on inter-state works contracts and other issues. A comprehensive Goods and Service Tax (GST) which is uniformly applicable across India has been introduced with effect from 1 July 2017. It has replaced most indirect taxes applicable to the infrastructure sector such as service tax, VAT, CST, excise duty and octroi duty. Certain taxes like the customs duty (on imports), stamp duty, municipal taxes, local body taxes etc. which are not subsumed under GST regime may also be applicable to infrastructure sector. However, for the purpose of this publication, we have restricted the regulations to GST only.

Certain pre-GST provisions have also been enumerated to enable comparison. As the infrastructure sector is broad, we have analyzed indirect tax implications on various subcomponents as under:

8.1 Transport (Roadways / Highways)

Any construction activity would generally involve supply of goods as well as a supply of services and could be construed as a works contract.

Generally, a contract of works, may relate to either a movable or an immovable

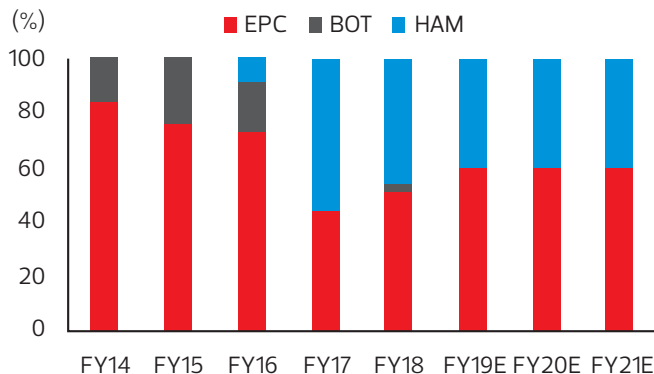
property. For example, if a contractor undertakes a contract for construction of a building, it would be construed as a works contract in relation to an immovable property. However, if a contractor undertakes contract for repairs and maintenance of a car, the same would be a works contract in relation to movable property.

For public infrastructure projects such as construction of road, power plant, etc., the Central or State Government enters into Public Private Partnership (PPP) financial models. The public partner is represented by the government at a local, state and/or national level and the private partner may be a privately-owned business, public corporation or consortium of businesses with each business having a specific area of expertise.

There are various PPP models in the construction Industry. However, the most popular PPP models for construction of roads and highways are as under:

- BOT-Toll Revenue Model
- Engineering Procurement & Commissioning (EPC contract)
- Hybrid Annuity Model ('HAM' which is a combination of EPC + Annuity Model)

The comparison graph of share of NHA project awards between the above three models for the period FY 2014 to FY 2021 is provided for the reference purpose.



As discussed above, the Indirect Tax / GST implications would vary for each and every model. Further, offset of taxes paid on input side against output liability would also vary for each model. Hence, selection of right model from Indirect tax perspective is very important to arrive at the project cost along with other relevant parameters.

8.1.1 Taxability of work contracts under Pre GST Regime:

A works contract has elements of both provision of services and sale of goods and was therefore taxable under State Specific VAT laws and Service tax law.

State specific VAT

- VAT was leviable on sale of goods. Under state specific VAT legislation, the value of goods portion used in execution of works contract on which VAT is payable would typically be determined as per the provision contained under VAT Laws of respective states.
- In general, following options were available to determine value of taxable sales under State Specific VAT legislations.

Options	Taxable value under VAT	VAT Rates
Actual Deduction	To be arrived after actual deduction of service from total contract value	Applicable rates vary from 5% to 15%
Ad-hoc deduction	To be arrived based on specific % of total contract value depending on nature of contracts	Applicable rates vary from 5% to 15%
Composition Scheme	Total Contract value	Varies from 1% to 8%

VAT credit was available subject to conditions.

Further, there was no exemption granted under VAT laws for constructions of roads and highways unlike in service tax, where there were certain conditional exemptions.

Service Tax:

- Service tax was an erstwhile tax that was leviable on provision of services. Under service tax legislation, for determining the value of service portion on which service tax is payable, following options were available:

Option 1: Actual Basis:

- Where value of transfer of property in goods in execution of works contract is deducted from Gross amount charged.

Option 2: Adhoc Basis:

- In case of original works – 40% of contract value
- In case of other contracts – 70% of contract value

Service tax was leviable @15% including KKC and SBC on the service value of the contract.

However, construction of roads, bridges, tunnels or terminals for road transportation for use by general public were specifically exempted⁴ from the whole of the Service Tax.

Also, service by way of access to a road or a bridge on payment of toll charges was covered under the negative list of services as per section 66D of the Service tax law and therefore toll charges were not exigible to service tax.

Input Tax credit ('ITC') was not available in the absence of output liability under Service tax law.

8.1.2 Taxability under GST regime:

BOT–Toll Revenue Model

⁴ Sr. No 13(a) of Mega exemption notification 25/2012–Service Tax dated– 20th June, 2012.

Under GST laws, the definition of "Works Contract" has been restricted to any work undertaken for an "Immovable Property" unlike the erstwhile VAT and Service Tax provisions where works contracts for movable properties were also considered.

The Works Contracts has been defined in Section 2(119) of the CGST Act, 2017 as "works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract."

Further, as per Para 6 (a) of Schedule II to the CGST Act, 2017, works contracts as defined in section 2(119) of the CGST Act, 2017 shall be treated as a supply of services. Thus, there is a clear demarcation of a works contract as a supply of service under GST laws.

Under the toll revenue model, typically we understand that a concession agreement is entered into between government entity (SPV) & a concessionaire. The concessionaire has been entrusted to construct, operate & maintain the project.

In simple terms, in this model, a road developer constructs the road and he is allowed to recover his investment through toll collection. This toll collection will be over a long period which is nearly 30 years in most cases. There is no government payment to the developer as the developer earns his money invested from tolls.

The SPV grants the concessionaire the rights which includes right to way, access and license to site, construction of highway, the right to demand, collect and appropriate fees from vehicle (toll charges), bear all cost expense and charges in connection with the concession agreement etc.

Further, under this model, the concessionaire bears the risk of revenue in the form of toll collection i.e. actual revenue may be lower than that was projected at the initiation of project.

- **GST implications on outward supply under Toll Revenue Model:**

Service provided by concessionaire by way of access to road or a bridge would be an exempt service as per exemption⁵ notification

Typically, industry in general has taken a view that the payment received in the form of toll charges is exempt under GST law and hence, there is no need to discharge any GST on such toll charges. Typically, a concession agreement also includes various rights assigned to the Concessionaire. There is however a need to review the concession agreement and clauses specific to toll collection and we recommend thorough review of contracts from an indirect tax perspective before deciding on incidence.

- **Input Tax Credit under Toll Revenue Model:**

As per Section 17(5)(d) of the CGST Act, 2017, input tax credit shall not be available for goods or services, or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account.

It may be noted that in case of BOT-Toll revenue contracts, typically, the concessionaire/contractor cannot be said to be procuring goods and services on its own account for construction of immovable property and hence, shall be eligible to claim ITC on goods and services procured for works contracts subject to condition that the concessionaire/contractor has taxable output services.

Further as per section 17(5) (c) of the CGST Act, 2017, input tax credit shall not be available in respect of the works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service. Thus, ITC for works contract can be availed only by one who is in the same line of business and is using such services received for further supply of works contract service. Hence, a sub-contractor providing works

⁵ Sr. No. 23 of Exemption Notification No. 12/2017-Central Tax (Rate)

contract service to a contractor / concessioner shall be eligible to claim ITC on goods and service procured by him for providing works contract service.

It is pertinent to however note that where a concessionaire/ contractor has both taxable and exempt supplies, as per CGST Rules, he would be required to reverse input tax credit attributable to exempted supplies and, also, the common input tax credits in so far as they pertain to exempt supplies. The tax credits reversed would construe a cost for the concessionaire/ contractor. The calculation of such reversals is an important task to be carried out during monthly and annual compliances.

8.2 Engineering, Procurement and Construction Contract (EPC contracts)

Under EPC Contract, the EPC contractor is made responsible for all activities from design, procurement, construction, commissioning and handover of the project to SPV or owner.

Under this model, the contractor agrees to deliver the project for a guaranteed price from SPV and does not bear the risk of revenue. The SPV bears the risk and rewards of revenue in the form of toll collection.

8.2.1 GST implication on outward supply under EPC Model:

As per Para 6 (a) of Schedule II to the CGST Act, 2017, works contracts as defined in section 2(119) of the CGST Act, 2017 shall be treated as a supply of services.

Rate of GST on works contract services relating to the construction of roads, and bridges for use by the general public shall be as under:

- 12% (6% CGST and 6% SGST)⁶
- 5% (2.5% CGST and 2.5% SGST) where earth work constitutes more than 75% when provided to Central Govt, State Govt, Local Authority, Govt Entity, Govt Authority subject to conditions specified therein.⁷

⁶ Notification No. 20/2017-Central Tax (Rate) dt. 22-08-2017

⁷ Notification No.-31/2017 Central Tax (Rate dt. 13-10-2017.

8.2.2 Input Tax Credit under EPC Model:

As per Section 17(5)(d) of the CGST Act, 2017, input tax credit shall not be available for goods or services, or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account.

In case of EPC contract, as the EPC contractor is not constructing road on his own account and hence, he shall be eligible to avail ITC for goods and services used for construction of road. However, it may be noted that Government entity / SPV may not be eligible to claim ITC for GST charged by EPC Contractor.

8.2.3 Hybrid Annuity Model ('HAM')

Typically, HAM is mix of EPC Contracts and BOT Annuity Model. As per design of the model, the Government will pay 40% of the project cost during construction phase and the remaining 60% will be paid on basis of asset created and performance of the contractor.

Under this model, the contractor agrees to deliver the project for a guaranteed price from SPV which will be received partly during construction phase and partly during operation and maintenance phase. The SPV bears the risk and rewards of revenue in the form of toll collection.

8.2.4 GST implications on outward supply under HAM Model:

- **During Construction Phase:**

Transaction between concessionaire and SPV would be in the nature of works contract services to the extent of consideration receivable by concessionaire during construction phase.

GST Implication on outward supply and Input Tax credit as discussed in EPC section is relevant here also.

- **During Operation Phase:**

Previously, there a view was adopted in the industry that consideration

received annually in so far as the same is attributable to construction of roads by way of annuity payments would be an exempt supply not chargeable to GST. This was because GST Council in its 22nd meeting, had recommended an exemption from GST on payment of annuity for construction of roads. Hence, relying on the recommendations from the GST Council, industry participants had taken a view that the services provided by concessionaire by way of construction of roads on annuity basis as exempt.

However, inconsistency arose when the GST Council provided the exemption only for "Services by way of access to road or bridges on payment of annuity". [Entry no 23A of Notification. 12/2017–Central Tax (Rate) through Notification no. 32/2017– Central Tax (Rate) dt. 13/10/2017. The exemption, did not appear at all, to consider the recommendations that the GST Council provided earlier. The exemption seems to suggest that only the annuity portion that pertains to toll would be considered as exempt and the exemption would not extend to any consideration for construction or EPC.

However, the GST authorities have ended the inconsistency between the Council recommendations and the Notification above, by further issuing a Circular no 150/06/2021 dated 17th June 2021 by clarifying that GST is applicable on the activity of construction of road where consideration is received in deferred payments (annuity). The Circular clarified that GST is exempt on services falling under SAC 9967 by way of access to a road or a bridge on payment of annuity. [Entry 23A of notification No 12/2017 CT(Rate). Hence entry 23 and 23A together exempts access to road or bridge where the consideration is in the form of toll or annuity.

Services by way of construction of road, however, fall under SAC 9954. Therefore, based on plain reading of the Circular mentioned, the exemption cited above does not seem to extend to consideration received towards construction or EPC work not falling in heading 9967, even if consideration is received during operations phase.

In view of the Circular, we would recommend contractors/concessionaires to take proper advice regarding incidence and classification of services supplied by them and consider the incidence and potential exposure in pricing of their contracts. The contract structure, scope of work and the classification of services would also need to be carefully examined from indirect tax perspectives.

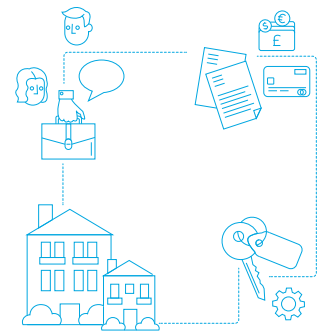
8.2.5 Input Tax Credit under HAM Model:

As per Section 17(2) of the CGST Act, 2017 read with Rule 42 of the CGST Rules, 2017, where goods or services are used for effecting taxable as well as exempt supplies, Input Tax Credit shall be restricted so much of the Input Tax Credit attributable to taxable supplies only. Hence, the Concessionaire would be able to claim proportionate ITC in the ratio of taxable and exempt outward supply.

8.3 GST on commercial and Social Infrastructure

8.3.1 Social Infrastructure – Residential

Affordable housing refers to housing units which are affordable for low income group people. It is a key issue for developing countries like India where majority of population is not able to buy a house because of its high market value. The indirect tax implications in case of real estate projects (i.e. other than affordable housing) are not discussed in this publication.



The Government has been consistently trying to promote affordable housing projects by providing various exemptions in Indirect tax laws. We now discuss the pre-GST and post-GST taxability of affordable housing projects.

Taxability under pre-GST regime:

- VAT

Applicable at rate as per State Specific VAT laws – You may like to refer

discussion at Para 8.2 – Taxability of works contract under Pre GST regime.

- Service tax

Exemption⁸ granted for Services by way of construction, erection, commissioning, or installation of original works pertaining to low cost houses up to a carpet area of 60 square meters per house in a housing project approved by various competent authority.

ITC was not available in the absence of output liability under Service tax law.

Taxability under GST regime:

- Outward Supply:

As per Section 7(1) of the CGST Act, 2017 read with Schedule II clause 5(b), construction of affordable and non affordable housing is supply of services under the GST Act liable to be taxed at applicable rate of tax.

- GST rates and classification:

Due to various changes made with respect to taxability of Real Estate projects, the analysis of GST rates needs to be done as on 31st March 2019 and with effect from 01st April 2019.

Up to 31st March 2019 :

Rate of Tax	Deduction towards land value	Effective rate of tax	Particulars	Classification
18% i.e. 9% CGST and 9% SGST	1/3 ^d	12% i.e. 6% CGST and 6% SGST	Other than Affordable Housing	9954- Construction Service.
12% i.e. 6% CGST and 6% SGST	1/3 ^d	8% i.e. 4% CGST and 4% SGST	Construction, erection, commissioning or installation of original	9954- Construction Service.

⁸ Sr. No 14 of Notification No. 25/2012 – Service Tax, dt. 20-06-2012

⁹ Notification 1/2018 – Central Tax (Rate) dt. 25-01-2018

Rate of Tax	Deduction towards land value	Effective rate of tax	Particulars	Classification
			works pertaining to low cost houses up to carpet area of 60 Square meter per house in a project approved by competent authority	

However, the council in 33rd & 34th GST Council meeting recommended implementing revised rates for residential properties. To give the effect of the aforesaid council decisions, the rates were revised by way of Notification No. 03/2019 dated 29/03/2019 effective from 01st April 2019. The GST rate structure for real estate projects have entirely been revamped w.e.f. 01st April 2019 onwards. Projects are segregated into Residential Real Estate Projects (RREP) and Real Estate Projects (REP).

For reference purpose, the GST rates w.e.f. 01st April 2019 are provided below for affordable & non affordable housing projects.

From 01st April 2019

Category of project	Nature	Rate of Tax (CGST + SGST)	Deduction towards land value	Effective rate of Tax (CGST + SGST)
RREP & REP	Affordable Housing**	0.75% CGST and 0.75% SGST	1/3 rd	0.50% CGST & 0.50% SGST
	Non affordable housing	3.75% CGST and 3.75% SGST	1/3 rd	2.50% CGST & 2.50% SGST

**Affordable housing under GST law shall mean:

A residential house/flat of carpet area of up to 90 sqm in non-metropolitan cities/towns and 60 sqm in metropolitan cities having value up to INR 45

lacs (both for metropolitan and nonmetropolitan cities).

It may be noted that, at present there is deemed deduction towards land/undivided share of land is provided. However, deduction for land value on actual basis is not available.

The rates specified above are applicable for construction of residential apartments in a project which commences on or after 01st April 2019. For projects which are ongoing as on 01st April 2019, the promoter has a one-time option to select i.e. to pay GST at old rates i.e. at 8% (effective tax) for affordable housing and 12% (effective tax) for other than affordable housing or to opt with new rates applicable w.e.f 01st April 2019 at 1% for affordable housing and 5% for other than affordable housing. The conditions and restrictions for opting new rates applicable w.e.f 01st April 2019 for on-going projects are not discussed herein and would require analysis by tax experts.

It is further very important to note that the sale of residential units, whether part of low-cost housing or not, where the entire consideration is received after issuance of completion certificate by the competent authority or first occupation, whichever is earlier, is outside the taxability net of GST.

– **Input Tax Credit:**

Till 31st March 2019, the developer was eligible to avail ITC on goods and services procured for construction projects.

However, with effect from 01st April 2019, for construction under affordable and non affordable housing, where effective output tax rate is 1% or 5%, input tax credit shall not be available.

As specified above, there was a one-time option available to promoters for projects which are ongoing as on 1st April 2019 to continue with old rates applicable prior to 01st April 2019 with benefit of claim of ITC or to opt for

new rates applicable w.e.f. 01st April 2019 with no benefit of ITC.

Further, sale of units where entire consideration is received after issuance of completion certificate by the competent authority will also attract proportionate reversal of ITC under Rule 42 and Rule 43 of the CGST Rules, 2017.

8.3.2 Social Infrastructure – Hospitals

Taxability under Pre GST regime:

- **VAT**

Applicable at rate as per State Specific VAT laws – You may like to refer discussion at Para 8.2 – Taxability of works contract under Pre GST regime.

- **Service Tax**

Services provided to the Government/Government Authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a structure meant predominantly for use as Clinical establishment is exempted.

Service of construction of Clinical Establishment not covered above would be taxable under Service tax and VAT. You may like to refer discussion at Para 8.2 – Taxability of works contract under Pre GST regime.

Health Care services by a clinical establishment, an authorized medical practitioner or para medics were exempt from service tax.

Taxability under GST regime:

- **Outward Supplies:**

Composite supply of works contract service provided to the Government/Governmental Authority by way of construction, erection, commissioning, installation, fitting out, repair, maintenance, renovation or

alteration of a structure means predominantly for use as a clinical establishment is taxable at 12%.

Construction of Clinical establishment not covered above would be taxable @18% under GST law.

Health Care services by a clinical establishment, an authorized medical practitioner or para medics are exempt¹¹ under GST law.

Further there may be cases where health care services are provided along with supply of medicines through pharmacy located in the hospital itself to in-patients. The same would be treated as composite supply where the principal supply will be supply of health care services¹²

- **Input Tax Credit:**

As per Section 17(2) of the CGST Act, 2017 read with Rule 42 of the CGST Rules, 2017, where goods or services are used for effecting taxable as well as exempt supplies, Input Tax Credit shall be available to the extent of Input Tax Credit attributable to taxable supplies only. Hence, the Clinical establishment would be able to claim proportionate ITC in the ratio of taxable and exempt outward supply.

Further, as per Section 17(5)(d) of the CGST Act, 2017, input tax credit shall not be available for goods or services, or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account.

Certain Important Clarifications under GST law¹³.

- **Hiring of senior doctors/consultants/ technicians independently by hospitals:**

¹¹ Sr. No. 74 of notification no. 12/2017 CT(R) dt. 28-06-2017.

¹² AAR in case of Ernakulam Medical Centre Pvt Ltd. (KER/16/2018 Dt. 19-09-2018)

¹³ Circular No. 32/06/2018 TRU Dated 12-02-2018

Hiring of senior doctors/consultants/ technicians may be undertaken independently by hospitals without any contract of such persons with the patient. In such cases, hospitals pay them consultancy charges, without there being any employer employee relationship. The matter under question was whether such consultancy charges will be taxable under GST given that there is no employer employee relationship. Vide Circular No.32/06/2018 TRU dated 12 February 2018, it was clarified that services so provided are health care services and are exempt from GST.

8.3.3 Social Infrastructure – Educational Institutions:

Taxability under Pre GST regime:

– **VAT**

Applicable at rate as per State Specific VAT laws – You may like to refer discussion at Para 8.2 – Taxability of works contract under Pre GST regime.

– **Service Tax**

Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a structure meant predominantly for use an educational establishment is exempted.

Services for construction of Educational Establishment not covered above would be taxable under Service tax and VAT. You may like to refer discussion at Para 8.2 – Taxability of works contract under Pre GST regime.

Services provided by an educational institution only to its students, faculty and staff are exempt. Any other services provided by educational institute would be taxable under Service tax at applicable rates.

- **Educational Institution is defined as an institution providing services by way of:**

- Pre-school education and education up to higher secondary school or equivalent;
- Education as a part of a curriculum for obtaining a qualification recognized by any law for the time being in force;
- Education as a part of an approved vocational education course

Taxability under GST regime:

- **Outward Supplies:**

Composite supply of works contract service provided to the Government/Government Authority by way of construction, erection, commissioning, installation, fitting out, repair, maintenance, renovation, or alteration of a structure means predominantly for use as an education establishment is taxable at 12%.

Construction of Educational Establishment not covered above would be taxable @18% under GST law.

Services provided by an educational institution only to its students, faculty and staff are exempt. Any other services provided by educational institute would be taxable under GST law at applicable rates. Definition of educational institute is identical to the definition provided under pre-GST regime.

- **Input Tax Credit:**

As per Section 17(2) of the CGST Act, 2017 read with Rule 42 of the CGST Rules, 2017, where goods or services are used for effecting taxable as well as exempt supplies, Input Tax Credit shall be available to the extent of Input Tax Credit attributable to taxable supplies only. Hence, the Education institute would be able to claim proportionate ITC in the ratio of taxable and exempt outward supply.

Further, as per Section 17(5)(d) of the CGST Act, 2017, input tax credit shall not be available for goods or services, or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account.

8.3.4 Commercial infrastructure: Malls

Taxability under Pre GST regime:

- **VAT and Service Tax:**

Construction of malls was taxable under Service tax and VAT without any concession / exemptions. You may like to refer discussion at Para 8.2 –

Taxability of works contract under Pre GST regime.

Renting, leasing of commercial property was taxable under Service tax @15% including KKC and SBC.



Taxability under GST regime:

- **Outward Supplies:**

The construction of malls would be in the nature of Composite supply of works contract services as defined under Section 2(119) of the CGST Act, 2017 read with Schedule II clause 6(a) and hence, would be taxable at 18% under GST law.

Renting, leasing of commercial property is taxable at 18% under GST law.

- **Input Tax Credit:**

As per Section 17(5)(d) of the CGST Act, 2017, input tax credit shall not be available for goods or services, or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account. Hence, the Mall owner would not be eligible to avail ITC

towards construction of mall.

However, Orissa High Court held that Input tax Credit on inputs/services used for construction of malls for the purpose of letting out is allowable since the title holder is liable to pay GST on the rental income. It may be noted that the Advance Ruling is binding only on the applicant who has opted for advance ruling and hence, taking a position based on advance ruling is not free from litigation.

8.4 Electrical Energy / Electricity – Generation, Transmission and Distribution

8.4.1 Thermal Power Plant

Taxability under Pre GST regime:

In the pre GST regime, there were exemptions under Excise and Customs on setting up of projects specified as 'Mega Power Project'.

As power to levy tax on consumption and sale of electricity is mentioned in state list Entry 53 of Constitution of India, generation, transmission & distribution of power was outside Central Excise and Service Tax laws & was not chargeable to Central Excise duty or Service Tax.

Further, sale of Electricity was exempt under State Specific Vat laws.

Taxability under GST laws:

– Outward Supplies:

Supply of Electricity is exempt under GST law.

The power generating companies typically engage contractors for construction / expansion of a thermal power plant. The contract between the contractor and the power generating companies would be considered as works contract under GST law as this would amount to construction of an immovable property. It would be taxable at 18% under GST law.

However, transmission or distribution of electricity by an electricity transmission or distribution company is exempt¹⁵ from GST.

- **Input Tax Credit**

As the output of thermal power generating plant which is electricity is exempt, the GST charged by contractors / vendors on input side will become cost for power generating company. However, there may be a possibility to segregate the scope and contract for setting up / installation of boiler turbine generator and other movable property and another scope for other civil work (related to immovable property). In such a case, the restriction on availing ITC may not be applicable to the extent the scope pertains to plant and machinery and other movable property. These aspects can be examined in detail and would require careful drafting of contracts, whether composite or vivisected, especially from an indirect tax perspective.

An interesting aspect to consider in GST would be availability of input tax credit on construction of captive power plants dedicated to providing power to manufacturing facility. In such cases, where the output is exigible to GST, it is not clear whether input tax credit would be available.

8.4.2 Solar Power Projects:

Taxability under Pre GST regime:

The taxability under pre-GST regime for solar power project is mutatis mutandis, similar to Thermal Power project as discussed in Para 8.4.1 above.

Taxability under GST regime:

- **Outward Supplies:**

Supply of Electricity is exempt under GST law.

¹⁵ Sr. No. 25 of Notification 12/2017-CT® dt. 28-06-2017

The power generating companies typically engage contractors for construction / expansion of a solar power plant. The contract between the contractor and the power generating companies would be considered as works contract under GST law as this would amount to construction of an immovable property. It would be taxable at 18% under GST law.

The solar power generating system and Photo voltaic cells are taxable at 5 % under GST law. However, works contract service is taxable at 18%. The Maharashtra AAR¹⁶ has held that construction of solar power system is a works contract since the services provided are in relation to immovable property & GST rate on the same shall be 18%.

CBIC has issued Notification¹⁷ that where there is a single works contract in relation to power plant, and services 70% of the gross value shall be deemed as the value of supply of said goods attracting 5% and the remaining 30 % portion of the aggregate value of such contract shall be deemed as the value of supply of taxable service attracting standard GST rate at 18%.

– **Input Tax Credit**

Similar to thermal power plants, as the output of solar power generating plant which is electricity is exempt, the GST charged by contractors / vendors on input side will become cost for power generating company.

8.5 Warehousing and Logistics

8.5.1 Warehousing:

Taxability under Pre GST regime:

Construction of warehouse was taxable under VAT and Service tax. You may like to refer



¹⁶ Renewables Private Limited (GST-ARA-01/2017/B-05)

¹⁷ Notification No.24/2018-CT (Rate) Dt. 31-12-2018

discussion at Para 8.2 – Taxability of works contract under Pre GST regime.

Service tax was levied on logistics & warehousing services at rate of 15% including KKC & SBC. However, there are various logistics and warehousing services such as "Services by way of loading, unloading, packing, storage or warehousing of rice, cotton, etc." which were exempted from levy of service tax as per notification issued¹⁸.

Taxability under GST regime:

– **Outward Supplies:**

The construction of warehouse is generally in the nature of Composite supply of works contract services as defined under Section 2(119) of the CGST Act, 2017 read with Schedule II clause 6(a) and hence, would be taxable at rate of 18%.

Warehousing service generally is taxable at 18%. Typically, warehousing services are bundled with other incidental services such as pest control services, fumigation services, security services etc. All such services combined together may fall under the scope of Composite supply of services as defined under Section 2(30) of the CGST Act, 2017 where warehousing services shall be the principal supply. Therefore, the rate of tax on providing warehousing services would be applicable on such composite supply also. Where these are, however not naturally bundled, they would be regarded as mixed supply and would be taxable at the highest tax rate applicable to the components.

Warehousing service provided for certain products such as rice, agriculture produce, minor forest produce, cereals, pulses, fruits etc. is exempted under GST.

– **Input Tax Credit:**

¹⁸ Notification 25/2012–Service Tax Dt. 20–06–2012

As per Section 17(5)(d) of the CGST Act, 2017, input tax credit shall not be available for goods or services, or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account. Hence, the warehouse owner would not be eligible to avail ITC towards construction of warehouses.

8.5.2 Logistics:

Taxability under GST regime:

- Roadways:

Transportation of goods by roads are subject to GST of 5% under reverse charge mechanism or 12% under forward charge. In case of reverse charge, the recipient of service is responsible for levying and payment of GST.

Further, transportation of goods by roads other than by GTA or courier agency or inland waterways are exempt under GST.

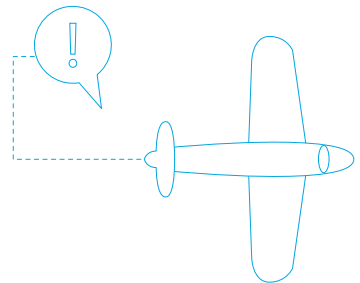
For transportation of passengers in non-air-conditioned contract carriage other than radio taxi or for any purpose other than tourism, conduct tour, charter or hire are exempt from GST.

Also transportation of passengers in metered cab or auto rickshaws or non-air-conditioned stage carriage are also exempt...

- Airways:

Service by way of transport of goods by way of airways is taxed at 18% for transportation within India.

Further service by way of transportation of goods by aircraft from place outside India to custom station of clearance in India & from custom station in India to place outside India is exempt from GST. However, the exemption with



regards to airfreight from custom station in India to place outside India was initially available till 30th September 2020 which was further extended till 30th September 2021. However, vide notification 07/2021 Integrated Tax (Rate) dated 30th September, 2021, the same has now been extended till 30th September 2022

Transportation of passengers embarking from or terminating to specified north-eastern states are exempt from GST.

For all other services, the services by way of transportation of passengers by air are taxable at 5% / 12% /18% subject to conditions.

- **Railways:**

Transport of goods via Indian railways is taxed at 5%¹⁹, which makes rail transport competitive with road transport. For transport of goods other than by Indian Railways, GST is applicable at 12% or 18% as specified in Notification.

Further, service by way of transportation of goods by rail within India for specified goods as mentioned in exemption notification such as relief materials for victims of natural disaster, agriculture produce; defense materials etc. are exempt²⁰ from GST.

Transportation of passengers by railways in class other than first class or air-conditioner coach is exempt²¹ from GST. Further, transportation by metro or monorails or tramway is also exempt²² from GST.

- **Waterways:**

The rate of GST on movement of goods by vessel is 5%²³.

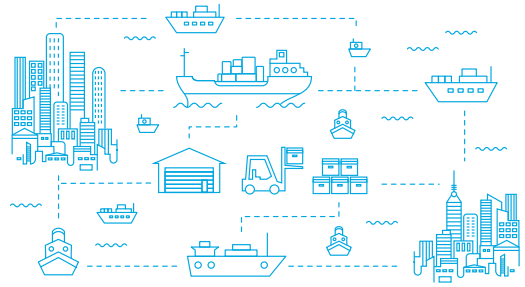
¹⁹ Sr. No 9 of notification no. 11/2017 Dt. 28-06-2017

²⁰ Sr. No 20 of notification no. 12/2017 Dt. 28-06-2017

²¹ Sr. No 17(a) of notification no. 12/2017 Dt. 28-06-2017

²² Sr. No 17(b) of notification no. 12/2017 Dt. 28-06-2017

Further transportation of goods by vessels from custom station in India to place outside India is also exempt. However, this exemption was initially available till 30th September 2020 which vide notification



04/2020 dated 30th September 2020 was further extended till 30th September 2021. However, vide notification 07/2021 Integrated Tax (Rate) dated 30th September 2021, the same has now been extended till 30th September 2022.

Service by way of transportation of goods by vessel within India for specified goods as mentioned in exemption notification such as relief materials for victims of natural disaster, agriculture produce; defense materials etc. are exempt²⁴ from GST.

Transportation of passengers by ways of inland waterways or public transport in a vessel other than predominantly used for tourism purpose is also exempt²⁵ from GST.

– **Inward Supply:**

As per Section 17(2) of the CGST Act, 2017 read with Rule 42 of the CGST Rules, 2017, where goods or services are used for effecting taxable as well as exempt supplies, Input Tax Credit shall be available to the extent of Input Tax Credit attributable to taxable supplies only. Hence, the Service provider would be able to claim proportionate ITC in the ratio of taxable and exempt outward supply.

²³ Sr. No 9 of notification no. 11/2017 Dt. 28-06-2017

²⁴ Sr. No 19(b) of notification no. 12/2017 Dt. 28-06-2017

²⁵ Sr. No 17(c)&(d) of notification no. 12/2017 Dt. 28-06-2017

8.6 Water Sanitation & Urban Waste Management

Taxability under Pre-GST regime:

Supply of services to government or government authority by way of water supply, public health, sanitation conservancy, solid waste management, was exempt²⁶ from service tax.

Further, services provided by Government or Government authority by way of any function entrusted to municipality under article 243W and 243G of the constitution such as urban planning, public health, sanitation conservancy and solid waste management, roads and bridges, fire services etc. and other services as specified in the Twelfth Schedule under article 243W was exempt⁴³ from Service tax.

Taxability under GST regime:

Exemption is provided for services provided to Government or Government Authority under article 243G and 243W of the Constitution:

- Pure Service²⁷
- Composite supply of goods and services in which the value of supply of goods constitutes not more than 25 per cent of the value of the said composite supply²⁸

Further, Service by way of treatment of effluents by a common effluent treatment plant is taxable at 12% (6% CGST & 6% SGST)²⁹

Sewage & waste collection, treatment and disposal and other environmental protection service are taxable at 18% (9% CGST and 9% SGST)

²⁶ Notification 25/2012- Service Tax Dt. 20-06-2012

²⁷ Entry 3 of notification 12/2017-CT (R) Dt. 28-06-2017

²⁸ Entry 3A of notification 12/2017-CT (R) Dt. 28-06-2017 as amended by notification 02/2018-CT (R) Dt.25-01-2018

²⁹ Entry 32 of notification 11/2017-CT (R) Dt. 28-06-2017 as amended by notification 01/2018-CT (R) Dt.25-01-2018

Also, services provided by operators of the common bio-medical waste treatment facility to a clinical establishment disposal of bio-medical waste & by way of public conveniences such as provision of facilities of bathroom, washrooms, lavatories, urinal, or toilets are also exempt³⁰ from GST.

As per Section 17(2) of the CGST Act, 2017 read with Rule 42 of the CGST Rules, 2017, where goods or services are used for effecting taxable as well as exempt supplies, Input Tax Credit shall be available to the extent of Input Tax Credit attributable to taxable supplies only.

8.7 Infrastructure Investment Fund ('INVIT'):

Taxability under GST regime:

Income received by INVIT from the SPV will be in the form of interest and dividend. An investor in the InvIT will be receiving dividend for funds invested.

Services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount will not be chargeable to GST³¹

Further, GST will not be applicable on dividend as it is neither supply of goods nor supply of services.

8.8 Key Issues under Infrastructure Sector in recent times:

8.8.1 ITC restrictions for the owner of the project

- As per Section 17(5)(d) of the CGST Act, 2017, input tax credit shall not be available for goods or services, or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account.

³⁰ Entry 76 of notification 12/2017-CT (R) Dt. 28-06-2017.

³¹ Entry 27(a) of notification 12/2017-CT (R) Dt. 28-06-2017

- Hence, the Project Owners for various infrastructure projects like construction of roads, highways, power plants, hospitals, warehouses, education institute, etc. are not eligible to avail ITC of GST being charged by the Contractor and hence, it results in to increase in cost of such projects.
- Further, Government has exempted Electrical energy as well as transmission and distribution of electricity under GST law. Hence, the power producing company and distributing company would be required to pay GST on procurement of goods and service however they cannot claim ITC or refund for the same which result in an increase in cost of the project.
- Additionally, the CBIC has recently issued a notification³² inserting new Rule 36(4) of the CGST Rules, 2017. The said notification has revamped the entire method of claiming input tax credit. As per the new rule, the registered person shall be eligible to claim the input tax credit of invoices or debit notes not reflecting in GSTR 2A only to the extent of 20% of the eligible credits i.e. the details of which are uploaded by the supplier and reflecting in GSTR 2A. The said limit of 20% was reduced to 10% and subsequently to 5% from January 2021 onwards. This has resulted in additional burden of matching input tax credit register with the Form GSTR 2A and also resulted into blockage of working capital due to restrictions imposed on availing ITC.

8.8.2 Deferment of ITC eligibility of GST paid on advances

- In case of advances, there will not be any supply of goods or services or both by the supplier to the recipient. However under GST law, as per time of supply provisions, receipt of advance shall be a taxable event and hence, the supplier has to make payment of GST on receipt of advance.
- One of the conditions for availing ITC is that the recipient of services should have received the services. Hence, while the supplier is liable to discharge GST on advance, the recipient shall not be eligible to claim ITC till the time he received the service. This leads to working capital blockage for the

³² Notification no. 49/2019-CT Dt. 09-10-2019.

recipient's business.

8.8.3 Deduction of land value – Deemed value and not the actual value

- Sale of land and building (except when sold before completion certificate), is neither supply of service, nor supply of goods under GST law.
- In order to determine value of supply of construction services which includes transfer of land or undivided share in the land, the GST law provides that the value of land shall be deemed to be one-third of the total amount charged.
- Hence the value of supply shall be the total amount charged less deemed value of land and not the actual value of land.
- The crucial issue would be whether this deemed deduction needs to be mandatorily followed. As per the notification issued, the answer is yes. The notification has not provided opportunity to deduct actual land value thereby making the actual land value irrelevant and whether the deemed deduction will be substituted for actual land deduction is still unanswered.

8.8.4 No Deemed exports benefit for goods portion in works contract for Power Projects

- In the pre GST regime, as Chapter 7 of the Foreign Trade Policy 2015–20, supply of specified goods to Notified Power Projects have been considered as 'deemed exports' and various benefits in the nature of advance authorization, duty drawback, and terminal duty refund were extended to such supplies.
- In the GST regime, such benefits are not available. The suppliers/ importers of such goods are liable to pay IGST/ CGST+SGST which increases cost to the power producers.

8.8.5 GST on movement of construction equipment between distinct persons

- Typically, in case of large EPC contracts, interstate movement of

construction equipment, spares and enabling items from one project to another is required to maintain continuous, uninterrupted flow of work process and to optimize the asset utilization.

- Such transfer of equipment was not chargeable to tax under pre-GST regime. However, such transfer would be treated as 'Supply' under GST law and hence, GST shall be payable on such transfer. While such movements constitute as supply and liable to levy of GST, the recipient is entitled to a full ITC and hence, it is a Revenue Neutral transaction for the Government. However, such taxability would lead to various issues such as blockage of working capital and adverse cash flows, additional compliance requirement, unwarranted delay, etc.
- Recently, the Government has granted some relief in this regard by providing clarification³³ that interstate movement of rigs, tools and spare and all goods on wheels (like cranes) between distinct persons for repairs and maintenance shall not be treated as supply of goods or services except when movement of such goods is for further supply of same goods.

8.8.6 Reversal of ITC if vendor is not paid within 180 days:

- As per GST law, if vendor is not paid towards value of supply along with the tax payable thereon within a period of 180 days from the date of invoice, ITC availed shall be added to the output liability of the recipient. If there is delay in such reversal of ITC, interest will be payable.
- The above restriction is forcing the business to make payment to the vendor within 180 days even if the credit period agreed between supplier and recipient as per commercial terms is more than 180 days.
- On making payment to vendor, the credit alone can be reclaimed, and the interest will be a cost.

³³ Circular no. 21/21/2017-GST

8.8.7 Benefit of zero rating to the sub-contractors of contractors supplying to SEZ

- As per Section 16 of IGST Act, supply of goods or services or both to SEZ unit or developer would be zero rated. While the benefits of zero rated supply is available to contractor supplying goods or service to SEZ unit or developer, the same benefits will not be available to sub- contractors supplying goods/services to such contractor. This leads to blockage of working capital for the contractor.
- As per Rule 10 of Special Economic Zones, Rule, 2006, the exemptions, drawbacks and concessions on the goods and services allowed to a Developer or Co-developer, as the case may be, shall also be available to the contractors including subcontractors appointed by such Developer or Co-developer. It may be observed that while SEZ Rules appears to provide similar benefits to sub-contractor also, GST law does not provide such benefits to sub-contractors.

8.8.8 Place of supply for works contract in relation to immovable property:

- Determination of place of supply of goods/ services under GST law is very relevant as the place of supply of goods and service along with location of supplier of service would determine whether the supply is interstate supply or intra state supply.
- As per Section 12(3) of IGST Act, 2017, place of supply of service in relation to immovable property shall be location at which the immovable property located or intended to be located.
- Where the construction of road involves multiple states, the place of supply would be different for different parts of the road depending on location of such immovable property. E.g.: Construction of road from Maharashtra to Gujarat, the supply of service shall be treated as made in each of the States in proportion to the value for services separately collected or determined, in terms of the contract or agreement entered into in this regard.
- This would lead to issues like obtaining GST registrations in both states,

raising separate invoices for all the states, increased compliance requirements, maintaining separate records, etc.

8.8.9 Liquidated Damages under works contract and GST Implication.

- As per Section 7 read with Schedule II of the CGST Act, 2017, 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' would be treated as supply of service. Accordingly, in case of any breach of condition or delay in completion of contract, liquidated damages to be recovered by the owner from the contractor shall be treated as supply of Service by the owner to the contractor. However, it is exempted³⁴ when fines or liquidated damages are payable to Central Govt, State Govt, Local Authority or union territory.
- It is important to note that the exemption notification³⁵ does not cover services supplied by 'Government Entity'. Hence the exemption notification would not be applicable when fines and liquidated damages are payable to Government entity and in that case, liable to be taxed at @ 18% under forward charge.
- Also, it was held in Advance Ruling³⁶ that violation charges for breach of conditions specified in a contract payable by contractors to Government entity needs to be treated as consideration and is chargeable to GST.

8.8.10 Anti-Profitteering

- In terms of Section 171 of the CGST Act, 2017, the suppliers of goods and services should pass on the benefit of any reduction in the rate of tax or the benefit of input tax credit to the recipients by way of commensurate reduction in prices. The willful action of not passing on the above benefits to the recipients in the manner prescribed is known as "profiteering.

³⁴ Vide Notification No. 12/2017-Central Tax (Rate) dt. 28-06-2017.

³⁵ Entry 62 of Notification No. 12/2017-Central Tax (Rate) dt. 28-06-2017.

³⁶ Dholera Industrial City Development Project Ltd (2019-TIOL-266-AAR-GST)

- The contractors having long term contracts which are 'on going' as on 1 July 2017 will need to look into their costing from scratch to ensure that the benefits on account of reduction in cost is passed on to the customers.
- It is crucial to note that CBIC extended the deadline for completion of investigation under Section 171 of the CGST Act, 2017 by authorities like Director General of Anti Profiteering (DGAP) till 31st March 2021. However, considering the pendency of cases, the GST council has decided to extend the tenure of National Anti-Profitteering Committee till 30th November, 2022.

9.1 Background

Companies in infrastructure sector are required to fulfill various compliances under all regulations governing them. This chapter lists down various forms / returns to be filed by infra companies under FEMA, IT Act and GST in a consolidated manner. Please note that this does not capture the due dates extended by the authorities due to COVID-19 pandemic.

Sr. No.	Forms / Returns	Due Date
9.1.1	FEMA compliances:	
i.	Details of issue of securities in Form FC-GPR	30 days from date of issue of shares
ii.	Annual Return on Foreign Liabilities and Assets in Form FLA	15 July of every year
iii.	Transfer of shares between residents and non-residents in Form FC-TRS	60 days from date of receipt of amount of consideration for transfer
iv.	Obtaining LRN in Form ECB	Before drawing ECBs or paying any charges thereof
v.	ECB returns in Form ECB-2	7 days from the close of the month
vi.	Downstream investment in Form DI	Form DI to be filed within 30 days from the date of allotment of capital instruments
9.1.2	Income-tax Compliances:	
A	TDS/TCS compliance	
i.	Quarterly TDS statements for payments to employees, vendors and non-residents in Form 24Q/26Q/27Q respectively	31 days from the end of quarter for 1st, 2nd and 3rd quarter of the year and 31st May for last quarter
ii.	TDS challan-cum-statement in Form 26QB for TDS on transfer of immovable property (Section 194-IA)	30 days from end of month in which deduction is made

Sr. No.	Forms / Returns	Due Date
iii.	Quarterly TCS statements in Form 27EQ	15 days from the end of quarter for 1st, 2nd and 3rd quarter of the year and 15th May for the last quarter
iv.	Issue of TDS/TCS certificate in Form 16/16A/16B/27D	<ul style="list-style-type: none"> • Form 16/12BA – by 15th June annually • Form 16A/27D – 15 days from the due date of furnishing of TDS/TCS statement • Form 16B – 15 days from the due date for furnishing the challan-cum-statement
v.	Monthly TDS / TCS payment to the account of central Government	7th of the following month and 30th April for the month of March.
B	Return of Income / Tax Audit Report / Transfer Pricing Report	
i.	Furnishing of tax audit report (Form 3CD)	For cases where transfer pricing is applicable 31st October of the AY; For other cases 30th September of the AY
ii.	Persons covered under tax audit (other than those to whom transfer pricing is applicable)	31st October of the AY
iii.	Furnishing of transfer pricing report (Form 3CEB)	31st October of the AY
iv.	Persons covered under transfer pricing (including those covered by domestic transfer pricing)	30th November of the AY
v.	Other persons	Corporate Assessee – 31st October of AY Others – 31st July of AY

Sr. No.	Forms / Returns	Due Date
C	Statement of Financial Transaction	
i.	Statement of Financial Transaction under Section 285BA in Form 61A	On or before 31st May immediately following the financial year in which the transaction is registered or recorded
D	Advance Tax Payments	
i.	1st Installment – 15% of Advance Tax	15th June of the FY
ii.	2nd Installment – 45% of Advance Tax	15th September of the FY
iii.	3rd Installment – 75% of Advance Tax	15th December of the FY
iv.	4th Installment – 100% of Advance Tax	15th March of the FY
E	Form 15CA / 15CB	At the time of remitting payment outside India.
9.1.3	GST Compliances:	
i.	GSTR 1 (Monthly)	11th of next month
ii	Quarterly Return Monthly Payment (QRMP)	GSTR 1- 13th day of the month succeeding the quarter. Monthly Tax payment:- 25th of next month for first 2 months of quarter in PMT 06 GSTR 3B-22nd or 24th day of the month succeeding the quarter.
iii	GSTR 3B	20th / 22nd of next month ³⁷
iv	GSTR 5 (NRTP)	20th of the next month
iv	GSTR 6 (ISD)	13th of the next month

³⁷ Due date is depending on the aggregate annual turnover and the state of registration.

Sr. No.	Forms / Returns	Due Date
v	GSTR 7 (TDS)	10th of the next month
vi	GSTR 8 (E-commerce)	10th of the next month
vii	GSTR 9 (Annual Return-Regular)	31st December of next financial year ³⁸
viii	GSTR 9 (Annual Return-Composition option)	31st December of next financial year ³⁸
ix	GSTR 10 (Final Return)	Within three months of the date of cancellation or date of cancellation order, whichever is later.
x	GSTR 9C (Reconciliation Statement)	31st December of next financial year ³⁸

³⁸ Subject to changes by notification or orders.

Abbreviations

Terms	Definition
AO	Assessing Officer
AY	Assessment Year
BEPS	Base erosion and profit shifting
CAGR	Compound Annual Growth Rate
CBDT	Central Board of Direct Taxes
CBIC	Central Board of Indirect Taxes and Customs
CGST	Central Goods and Service Tax
DDT	Dividend distribution tax
DIPP	Department of Industrial Policy and Promotion
EBITDA	Earnings before Interest, taxes, depreciation, and amortization
EURIBOR	Euro Interbank Offered Rate
FCTR	Foreign Currency Translation Reserve
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act, 1999
FPI	Foreign Portfolio Investors
FVCI	Foreign Venture Capital Investors
FY	Financial Year
GAAP	Generally Accepted Accounting Principles
GDP	Gross Domestic Product
GOI	Government of India
GST	Goods and Services Tax
GTA	Goods Transport Agency
GW	Gigawatt
HUF	Hindu Undivided Family
ICDS	Income Computation & Disclosure Standards
IFOS	Income from Other Sources
IFRS	International Financial Reporting Standards
INR	Indian Rupee
IRR	Internal Rate of Return
IT Act	The Income Tax Act, 1961
ITC	Input Tax Credit
JV	Joint Venture
KKC	Krishi Kalyan Cess
LIBOR	London Interbank Offered Rate
LLP	Limited Liability Partnership
LTCG	Long Term Capital Gain
MTM	Mark to Market

Abbreviations

Terms	Definition
NRI	Non Resident Indian
OCB	Overseas Corporate Bodies
OCI	Overseas Citizen of India
OECD	Organization for Economic Cooperation and Development
PE	Permanent Establishment
PGBP	Profits and Gains of Business or Profession
RBI	Reserve Bank of India
RCM	Reverse Charge Mechanism
SBC	Swachh Bharat Cess
SEBI	Securities and Exchange Board of India
SEZ	Special Economic Zone
SGST	State Goods and Service Tax
SPV	Special Purpose Vehicle
STCG	Short Term Capital Gain
TCS	Tax Collected at Source
TDS	Tax Deducted at Source
VAT	Value Added Tax

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