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Katalyst Kaleidoscope

May 2019: Tax and Regulatory Insights

A. Income-tax Highlights

1. Bombay HC quashes Assessing Officer's ('AO') order for non-grant of 197 Certificate (application for nil withholding tax) and directed the Revenue to release tax already deducted in favour of the taxpayer, subject to conditions

In this case[1], the AO rejected the Mauritian assessee's application for nil withholding tax certificate under section 197 of the Income-tax Act, 1961 ('IT Act') for availing the grandfathering provisions on capital gains under Article 13(4) of India-Mauritius Tax Treaty, arising on sale of shares held in an Indian company acquired prior to 1 April 2017. The AO perused the corporate structure of the assessee and held that the transaction was created to avoid legitimate tax liability, thereby concluding it as a 'colourable device'.

On a writ petition filed by the assessee, the Bombay HC, relying on Central Board of Direct Taxes ('CBDT') circular no. 789 dated 13 April 2000, held that Tax Residency Certificate ('TRC') issued by Mauritius Government, will constitute sufficient means for accepting status of the residence as well as beneficial ownership for applying the Tax Treaty. Further, the HC noted that the Tax Department did not provide sufficient prima facie material to demonstrate that the entire transaction was a sham and the existence of the assessee was fraudulent. Accordingly, the Bombay HC directed the AO to issue the nil withholding tax certificate and release the taxes as deducted by the payer.

However, despite the above, the HC observed that the Revenue's case cannot be totally shut down since the actual facts of the transaction and bonafide purpose has to be dealt in detail during the course of assessment proceedings. Accordingly, in order to protect the interest of the Revenue, the Bombay HC directed the assessee to maintain and hold a certain minimum shareholding in the Indian entity, until the completion of assessment under the IT Act, thereby providing a security of over 200% of the disputed tax amount (if any) arising from the aforesaid transaction at the time of assessment proceedings.

Katalyst Comments: *While CBDT Circular No. 789 clarified that a TRC obtained from the Mauritian Authorities would be considered as an adequate proof for tax treaty benefits, the major challenge lies in obtaining nil withholding tax certificates, at the time of exit by a Mauritian seller, mainly because the tax officers are reluctant to provide the Capital gains tax protection as available under the Tax treaty, even if a valid TRC is presented. This not only stalls transactions (due to endless commercial negotiations between the parties) but also results in sub-optimal outcomes. In the interest of ease of doing business, issuance of a circular by CBDT directing the tax officers to give due consideration to TRCs for issuing nil withholding certificates for pre-31 March 2017 grandfathered investments is imperative and would be a major relief to the investors.*

[1] Indostar Capita v ACIT (International Taxation) – Writ Petition No. 3296 of 2018

2. Timelines prescribed under section 139(5) are not applicable to revised returns filed pursuant to NCLT amalgamation order

In the given case[2], the assessee had filed manual revised returns pursuant to an order issued by the NCLT approving the amalgamation, beyond the prescribed timelines as provided under section 139(5) of the IT Act, which were considered invalid by the Revenue Authorities since the same was filed without obtaining a condonation of delay from CBDT under section 119(2)(b) read with CBDT Circular No.9 of 2015.

However, the Madras HC, relying on SC ruling in Marshall and Sons & Co. (India) Ltd[3] and co-ordinate bench ruling in Pentamedia Graphics Ltd[4], held that the NCLT approved Scheme has a statutory force, which overrides the stated CBDT circular and the same is binding on the Revenue Authorities.

3. Whether distribution of assets to a retiring partner is chargeable to tax under section 45 in the hands of the retiring partner and the partnership firm?

The Bangalore Tribunal in case of Savitri Kadur[5] and Madras HC in case of National Company[6] expounded their views while determining the taxability arising on the distribution of assets by a partnership firm at the time of retirement in the hands of the ***retiring partner*** and the ***partnership firm*** respectively. The key issues for consideration and the decision of the appellate authorities, in both the cases, is outlined as under:

Particulars	Bangalore Tribunal	Madras HC
Assessee	Retiring Partner	Partnership Firm
Nature of distribution	***Cash Consideration*** discharged by Partnership Firm, over and above sums lying in the credit of the partners' capital account, at the time of retirement.	***Immovable properties*** held by the partnership firm were distributed to the retiring partners to the extent of credit balance in the capital account
Issues under consideration	Whether, in the hands of the **retiring partner**: • There was any 'transfer' of interest in assets of the partnership firm by the retiring partner under section 2(47) of the IT Act?	Whether, in the hands of the **partnership firm**: • Distribution of immovable properties by the partnership firm to the retiring partners is considered as 'transfer' under section 2(47) of the IT Act?

[2] M/s Dalmia Power Ltd and M/s Dalmia Cement (Bharat) Limited vs. ACIT – W.P [MD] No. 25314 & 25315 of 2018
[3] Marshall Sons & Co. (India) Ltd. Vs. ITO - (1997) 223 ITR 809 (SC)
[4] Pentamedia Graphics Ltd. Vs. ITO - (2010) 236 CTR 204 (Mad)
[5] Savitri Kadur Vs. DCIT – ITA no. 1700/Bang/2016
[6] M/s National Company Vs ACIT – Tax Appeal No. 365 & 366 of 2009 (Mad)

Particulars	Bangalore Tribunal	Madras HC
	• If yes, whether the excess sum paid by a partnership firm is chargeable to tax under section 45 of the IT Act?	• If yes, whether such transfer, on retirement, is chargeable to capital gains tax under section 45(4) of the IT Act?
Ruling / Judgement	• The share or interest of a partner in the partnership and its assets would be considered as a partner's 'property' under section 2(14) of the IT Act. • Relying on Mumbai Tribunal ruling in case of Sudhakar M. Shetty[7], Bangalore Tribunal held that the act of giving up or relinquishing rights by the retiring partner in the partnership firm is 'transfer' of capital asset, chargeable as capital gains under section 45 of the IT Act. ***(Held against the assessee)***	• Section 2(47)(iv) defines the term 'transfer' to *inter-alia* include any transaction that has an effect of transferring, or enabling enjoyment of immovable property. • A partner has right to obtain a share in profits during the subsistence of and value in the share of net assets upon firm dissolution or retirement. • Therefore, when a partner retires, he receives his share in the partnership, and not any consideration for transfer / relinquishment of his interest in the partnership to the continuing partners. Accordingly, a reconstitution of firm would not attract the provisions of section 45(4) of the IT Act. ***(Held in favour of the assessee)***
Divergent views	• In case of Smt. Hemlata S. Shetty[8], Bombay HC has held that amount received by a partner on retirement from a partnership firm is not liable to capital gains tax in the hands of the said partner. ***(Held in favor of the assessee)***	• In case of A.N. Naik Associates[9] the Bombay HC held that the words 'otherwise' under section 45(4) also includes retirement of partners. Accordingly, provisions of section 45(4) are attracted in the hands of a partnership firm, even in the event of transfer of firm's assets to a retiring partner. ***(Held against the assessee)***

Katalyst Comments: *The issue of capital gains taxation of partnership on distribution of assets on retirement or reconstitution of partnership has been a matter of long drawn*

[7] Sudhakar M. Shetty Vs. ACIT – 130 ITD 197 (Mum)
[8] PCIT Vs. Smt Hemlata S. Shetty – [2019] 262 Taxman 324 (Bom)
[9] CIT Vs. A.N. Naik Associates [2004] 265 ITR 346 (Bom)

litigation, and still continues to be so. While the ratio of the SC in case of Mohanbhai Pamabhai[10], that no capital gains tax should be attracted in the hands of retiring partner, should prevail, appellate authorities have time and again, distinguished the same and held that capital gains tax is chargeable, either in the hands of partners or the partnership firm. The conflict between the judicial views and the provisions of section 45 of the IT Act should be clarified at the earliest, in the interest of certainty and to curb unwarranted litigation.

4. Bombay HC aside CBDT policy to incentivize Commissioner of Income-tax (Appeals) [‘CIT(A)’] for passing “quality appellate orders” in favor of Revenue

In a Public Interest Litigation filed by the Chamber of Tax Consultants[11], the Bombay HC struck down the relevant portion of the “Central Action Plan” issued by CBDT which involved allocation of reward points as an incentive to CIT(A) for passing “quality appellate orders” in favor of the Income-tax department [i.e. orders where enhancement of income is made or has been strengthened, in the opinion of CCIT or a penalty under section 271(1)(c) of the IT Act has been levied by the CIT(A)].

The HC held that any interference in the discretion of a statutory authority in exercise of its appellate powers from any source, including the superior officers, is wholly impermissible and invalid. Further, section 119(1) of the IT Act[12] prohibits the CBDT from issuing any directions which require any income tax authority to dispose-off the case in a particular manner and any transgression into the same would amount to a breach of the provisions of the IT Act.

Katalyst Comment: *This is a welcome decision by the HC, granting a huge relief to large tax payers during the course of appellate proceedings. This strips down the impartiality bestowed on the appellate office, which is a central principle to any adjudication proceeding. However, under the same writ petition, the CTC had also challenged the CBDT directions for deciding the appeals within the prescribed timelines, which were not considered as arbitrary or unreasonable by the HC. This may cause hasty disposal of matters with a possibility to deny a fair opportunity of being heard to the appellant assessee.*

5. Excess share premium is not to be taxed under general provisions of section 56(1) if specific provisions of section 56(2)(viib) are not applicable

The Hyderabad Tribunal[13] observed that the assessee company, Apollo Sugar Clinics Ltd, is a subsidiary of a Company which qualifies to be a “company in which the public are substantially interested” u/s 2(18) of the IT Act, and accordingly, concluded that the excess share premium

[10] CIT v. Mohanbhai Pamabhai - [1973] 91 ITR 393 (SC)

[11] The Chamber of Tax consultants & ors v. CBDT and Union of India (Writ Petition No.3343 of 2018/PIL No. 144 of 2018 dated 11 April 2019)

[12] Section 119 of the IT Act - Instructions to subordinate authorities

[13] Apollo Sugar Clinics Ltd Vs. DCIT – ITA no. 2045/Hyd/2018

received on issue of its equity shares should not be bought to tax under section 56(2)(viib) as the provisions of the same are only applicable to closely held companies.

Further, the Tribunal also noted that the definition of income under section 2(24)(xi) of the IT Act only includes excess share premium which is taxable under section 56(2)(viib) and accordingly, since the same is inapplicable to the assessee, the AO was incorrect to tax the excess premium by invoking the residuary provisions under section 56(1) of the IT Act.

Katalyst Comments: *While the principle of specific provisions prevailing over the residuary / general provisions is upheld by the Tribunal, it should be understood that conceptually, an amount infused in a Company by way of share capital or premium cannot have the character of income. Section 56(2)(viib) of the IT Act is clearly in the nature of an outlier provision and should not be on the statute in the first place, partly since there are enough provisions in the IT Act to deal with sham transactions in the nature of excessive premium.*

6. CBDT invites public comments on the proposal of Rules of Profit attribution to a Permanent Establishment (‘PE’)

Currently, the profit attributions to a PE in India under Article 7 of the DTAA of a foreign entity are highly skewed towards the supply functions with almost no cognizance to the demand functions, thereby causing no attribution of business profits to the developing economies (like India) which have a steep consumption curve in comparison to the exporting, developed countries. Further, due to lack of a universal rule for profit attribution, diverse methodologies are being adopted by the AOs while applying Rule 10 of the Income-tax Rules, 1962 (‘IT Rules’) for varied cases.

Recognizing these significant issues and in order to bring greater clarity in the applicable tax regime, a Committee formed by CBDT examined the existing scheme of profit attribution and submitted its report on several recommendations on 18 April 2019 to the CBDT, which is now open for comments from the stakeholders (to be submitted by 18 May 2019). The key recommendations are as under:

- Strive for a balanced approach that allocates profits partly to the jurisdiction where the consumers are located and partly to the jurisdiction where supply activities are undertaken;

- Introduction of a fractional apportionment approach that determines profit attribution based on three-factor method, assigning equal weights to sales (representing demand), manpower, and assets (representing supply);

- Under the fractional apportionment approach, profits derived from Indian operations can be arrived at by applying the global operational profit margin of a foreign enterprise to

the revenue derived from India, as further adjusted with reference to certain weightages relating to various factors, e.g. assets, employees, wages, etc;

- For profit attribution of Significant Economic Presence in India, to adopt a four-factor approach wherein 'Users' are to be considered as the fourth factor;

- In order to avoid double taxation from Indian operations in the hands of PE as well as an Indian Associated Enterprise (such as Indian subsidiary), profits that have been already subjected to tax in the hands of AE should be deducted from the apportioned profits;

- To protect India's revenue interest in situations where an enterprise is having global operating losses, it is recommended that profits attributable to India be subject to a floor rate of 2 percent.

Katalyst Comments: *The CBDT report has clearly aimed at amending Rule 10 of the IT Rules regarding profit attribution to a PE in India. However, certain recommendations need reconsideration. For example, the weightage to sales (33%) and manpower and assets (together 67%) appears inappropriate in terms of sales being given unjustifiably high weightage, and also because weights for functions and risks have been totally ignored. Further, the formulas outlined may seem to be apparently simple, but could be incapable of execution on the ground level. Also, the provision for attribution for a minimum of 2% even if the MNC makes a loss globally, is extremely unfair and unjustified and goes against the principle of taxation of real income.*

7. CBDT specifies procedure, formats and standards for the issuance of TDS certificate for salaries (i.e. Form 16) from TRACES Portal

CBDT, vide its notification[14], has made it mandatory for all deductors / employers to issue the TDS certificate in Part B of Form no. 16 (Annexure containing details of income) by downloading it from the TRACES Portal. This will be applicable in respect of all sums deducted on or after 1 April 2018 under the provision of Section 192 of the IT Act, provided the Form 24Q for the fourth quarter is furnished along with the Annexure II[15].

In addition, the deductors need to authenticate the correctness of the contents mentioned therein before issuing it to its employees, and verify the same using either a manual or digital signature. The TRACES generated Form No. 16 shall have a unique TDS certificate number.

[14] Notification No. 09/2019 dated 6 May 2019
[15] Substituted by CBDT notification No. 26/2019 dated 12 April 2019

8. **CBDT further defers the furnishing of GST and GAAR details in Tax Audit Report till 31 March 2020**

Formerly, reporting of details in Form 3CD (i.e. Tax Audit Report) pertaining to disclosure of transactions which are impermissible avoidance arrangement under Chapter X-A of the IT Act (i.e. GAAR) under Clause 30C and break-up of total expenditure of entities registered or not registered under the GST under Clause 44 was kept under abeyance till 31 March 2019 by CBDT[16].

Considering several representations received for deferring the implementation of reporting under the said clauses in Form 3CD, the CBDT[17] has decided to keep such reporting in further abeyance till ***31 March 2020***.

B. SEBI Highlights

1. **Securities and Exchange Board of India ('SEBI') amended SEBI (Infrastructure Investment Trusts) Regulations, 2014 ("InvIT Regulations") and SEBI (Real Estate Investment Trusts) Regulations, 2014 ("REIT Regulations") as under:**

➢ **Private placement norms for unlisted InvITs:**

SEBI has introduced[18] regulatory framework under Chapter VIA, to enable private placement of InvIT units which are not listed (which was not permissible under the earlier regime). Prior to the said amendment, InvIT units, whether publicly offered or privately placed, were mandatorily required to be listed on the stock exchanges.

The key features of privately placed "unlisted InvITs" are as follows:

- Funds can be raised through a placement memorandum only from institutional investors and body corporates (whether in India or foreign);
- Investment value for each investor in unlisted InvITs shall not be less than INR 1 Crore, with a maximum of 20 Investors;
- The unlisted InvIT is required to invest not less than 80% of value of InvIT assets in eligible infrastructure projects;
- An unlisted InvIT is permitted to borrow to the extent permitted under Trust Deed (i.e. upto 100%) subject to conditions in the Trust Deed. Accordingly, thresholds applicable to

[16] CBDT Circular No. 06/ 2018 dated 17 August 2018
[17] CBDT Circular No.09/2019 dated 14 May 2019
[18] SEBI (Infrastructure Investment Trusts) (Amendment) Regulations, 2019 - notification dated 22 April 2019

listed InvITs (revised to 70% of the listed InvIT assets[19]) is not applicable to an unlisted InvIT;

- Existing privately or publicly placed listed InvITs can migrate to this framework on obtaining the approval of more than 90%[20] of its unit holders by value and providing an exit to the dissenting unit holders; conversely, a privately placed unlisted InvIT may choose to list its units on recognized stock exchanges, subject to compliance with the provisions applicable to listed units prescribed by SEBI

➢ **Relaxation for the publicly offered and privately placed listed units of InvITs:**

In addition to the above, SEBI also notified certain relaxations, for the public offered and privately placed listed units of InvITs in order to provide more flexibility to the issuers as under:

- Minimum lot size revised and reduced from INR 10 lacs to INR 1 Lac;

- Revision in Trading lot size from INR 5 lacs to a lot size of 100 units; and

- Relaxation and increase in the limit of aggregate consolidated borrowings and deferred payments of the InvIT from 49% to 70% of the value of InvIT assets, subject to prescribed conditions such as:
  - Obtain "AAA" or equivalent credit rating from a registered credit rating agency;
  - Utilize borrowed funds only for acquisition or development of infrastructure projects;
  - Have a prior track record of six distribution of dividends; and
  - Approval from 75% of unit holders by value to be obtained

➢ **Reduction of minimum subscription requirement for REITs and InvITs and additional financial disclosures for InvITs:**

In order to amend the minimum subscription size and trading lot for publicly offered REITs and InvITs, SEBI notified[21] the following to amendments, as under:

Sr. No.	Particulars	Amendment
1.	For determining the value of allotment in **an initial offer**	• Value of each allotment lot shall not be less than: - For InvITs – INR 1 lakh - For REITs – INR 50,000 • Lot size for InvITs and REITs - 100 units. • Allotment to be made in multiples of lot
2.	For determining the minimum value of	• Minimum allotment shall be of such number of lots, whose value is not less than: - For InvITs – INR 1 lakh

[19] Revised as per amendment to Regulation 20 in SEBI (Infrastructure Investment Trusts) (Amendment) Regulations, 2019
[20] As per Regulation 22(5B) newly inserted
[21] SEBI Circular No. SEBI/HO/DDHS/DDHS/CIR/P/2019/59 dated 23 April 2019

Sr. No.	Particulars	Amendment
	allotment in a **follow-on offer**	- For REITS – INR 50,000 for REITs • Each lot shall consist of such number of units as in its trading lot • Allotment to be made in multiples of lot
3.	Enhanced disclosures for InvITs borrowings exceeding 49% of the InvIT assets	• Additional disclosures as under: - Asset cover available; - Debt-equity ratio; - Debt service coverage ratio; - Interest service coverage ratio and - Net worth

Katalyst Comments: *Enhancing the borrowing limits for InvITs and revising the minimum subscription value for REITs and InvITs demonstrates SEBI's intentions to provide flexibility to the issuers in terms of fund raising and facilitating the access of these investment vehicles to investors. However, one may have to evaluate the availability of tax benefits (such as pass throughs status under IT Act, Dividend Distribution Tax exemption in the hands of SPVs etc.) to such unlisted InvITs, keeping in mind the existing definition of "business trust" under the IT Act and in view of the option of listing the units (instead of mandatory requirement).*

2. **Relaxation from SEBI for obtaining public shareholders consent for Company's voluntary delisting under Regulation 27 of the SEBI Delisting Regulations:**

SEBI, on review of application made by RIEL Electricals India Limited ('REIL'), relaxed the requirement under Regulation 27 of the SEBI (Delisting of Equity Shares) Regulations, 2009 ('Delisting Regulations') for obtaining the consent of at least 90% of the public shareholders for voluntary delisting of its equity shares.

It noted that the public shareholders of REIL held a nominal stake of 1.81% since 1998 and thereafter, pursuant to an amendment in Regulation 19A of the Securities Contracts (Regulation) Rules, 1957 ('SCRR') (w.e.f 4 June 2010), which requires a listed company to maintain a minimum public shareholding of 25%, the Board of REIL had proposed, twice, for a voluntary delisting which ultimately failed due to lack of the strength of votes from the public shareholders.

Considering the genuine attempts made by REIL and given that there were no investor grievances pending against the Company, SEBI was of the opinion that no useful purpose would be served for the Company to remain listed and hence, relaxed the applicability of the provisions under SCRR and Delisting Regulations.

C. Corporate Law Highlights

Ministry of Corporate Affairs ('MCA') notifies thresholds for filing class action lawsuits

With an aim to provide a redressal mechanism to small and minority investors, MCA amended National Company Law Tribunal Rules, 2016[22] with respect to filing a class action suit under section 245(1) of the Companies Act, 2013, in cases of mismanagement of a company by its directors. The key thresholds for initiating the class action suit under the revised regulations are as under:

- In case of company having a share capital, an application for class action suit can be filed by members representing atleast 5% of the total number of members or 100 members, ***whichever is less.*** Similar thresholds are applicable to depositors seeking to file a class action suit against deposit taking companies

- ***Alternatively***, a class action suits may also be initiated by members as under:
  - In case of a ***listed company*** – members holding atleast 2% of the issued share capital; and
  - In case of an ***unlisted company*** - members holding atleast 5% of the issued share capital;

Katalyst Comment: *The Governments move to notify the thresholds for filing class action lawsuits will not only improve corporate governance in India but also be helpful in protecting the interest of minority shareholders. Further, it would also reduce frivolous litigations, especially in instances involving mergers & acquisitions, where even a single dissenting minority shareholder, could challenge the modus operandi of acquisitions by the Company.*

D. RBI and Foreign Exchange Regulations Highlights

Reserve Bank of India ('RBI') permits Foreign Portfolio Investors ('FPIs') to invest in Municipal bonds

As a measure to broaden the access of non–resident investors to debt instruments in India, the RBI[23] permitted the FPIs to invest in municipal bonds on repatriation basis. Accordingly, a new Regulation 2(xlvii) has been incorporated under the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 which defines 'Municipal Bonds' to mean debt instruments issued by municipalities constituted under Article 243Q of the Constitution of India.

Further, as per the RBI notification, the FPI Investment in such municipal bonds shall be reckoned within the limits set for FPI investment in State Development Loans (SDLs) [i.e. 2% of outstanding securities].

[22] National Company Law Tribunal (Second Amendment) Rules, 2019 dated 8 May 2019
[23] A.P. (DIR Series) Circular No. 33 dated 25 April 2019

Following the above liberalization by RBI, SEBI also, vide its notification[24], permitted FPIs to invest in the municipal bonds under Regulation 21(1)(p) of the SEBI (Foreign Portfolio Investors) Regulations, 2014.

Katalyst Comment: *An important move by the RBI and SEBI, which empowers local municipalities to gain an access to foreign funds. The said investment opportunity could churn the investments inflows in the bond market, especially considering that FPIs are permitted to invest in debt market instruments such as Government bonds, State development loans and corporate bonds, which are subject to prescribed limits and restrictions by the RBI.*

E. Insolvency & Bankruptcy Code Highlights

1. National Company Law Appellate Tribunal ('NCLAT') held that Income-tax dues are treated as "operational creditor"

In the case of Synergies Dooray Automotive Ltd. & Ors.[25], the grievance of the tax authorities was that the resolution plan (as approved by the Committee of Creditors ('CoC') of the Corporate Debtor) reduced the outstanding tax liabilities of the Corporate Debtor drastically, without providing the tax authorities an opportunity of being heard either before the CoC meeting, or before the NCLT, at the stage of approval.

The NCLAT held that an 'operational debt', defined under section 5(21) of the Insolvency & Bankruptcy Code ('IBC'), is a debt arising during the operation of a company, and that statutory liabilities such as income tax, sales tax, value added tax and various other taxes, arise only when a company is operational, thus establishing a direct nexus with the operations of the company.

Accordingly, the NCLAT held that the statutory dues payable to tax department are 'operational debt' and the statutory authorities claiming the aforesaid dues will be treated as 'operational creditors' under section 5(20) of the IBC, thereby dismissing all appeals preferred by the tax authorities and upheld the drastic haircuts as approved by the NCLT in the resolution plan.

Katalyst Comments: *Considering that the priority order at the time of distribution of assets to 'operational creditors' of a Corporate Debtor ranks lower than dues payable to financial creditors, they generally receive only a fraction of their outstanding dues. This may have a severe revenue loss for the tax authorities pending recovery from insolvent companies.*
However, statutory reliefs granted to insolvent companies under section 79 of the IT Act (for carry forward and set off of losses even if there is a change in shareholding pattern) and section

[24] SEBI Circular No. IMD/FPIC/CIR/P/2019/62 dated 8 May 2019

[25] Pr. Director General of Income Tax (Admn. & TPS) vs M/s. Synergies Dooray Automotive Ltd. & Ors. - Company Appeal (AT) (Insolvency) No. 205 of 2017

115JB of the IT Act (for aggregate adjustment of book loss and unabsorbed depreciation under MAT computation), which are approved in the resolution plan by the NCLT, shall not be affected and should not lapse due to the aforesaid ruling.

F. Goods and Service Tax Highlights

1. Dismissal of Special Leave Petitions ('SLPs') by the Supreme Court (SC):

- The SC admitted a SLP filed by the revenue and stayed the operation of a Gujarat HC judgement which struck down 1-year time limit for availment of transition credit.
- The SC dismissed the SLP filed by the CBIC, GST council against Delhi HC order allowing exemption of IGST in case of import under advance authorisation scheme.

2. Rulings by HC:

- **Telangana HC - Applicability of Interest on total liability and not on net liability:**
  The Telangana HC[26] dismissed the writ filed by the assessee and held that the interest under section 50 of the CGST Act is payable on total tax liability without set-off of ITC, and not on the net tax liability after adjustment of eligible ITC, in case where the returns are filed belatedly.

- **Delhi HC - No tax demand, interest and penalty if non-filing of return is due to design limitation of GST Returns:**
  The petitioner's attempt to revise the return, after obtaining the credit, which was allocated to its unit could not be materialized on account of certain design limitations of GST returns and therefore, no further demand, interest, penalty or late submission fees should be enforced, held Delhi HC[27] and dismissed the writ.

3. GST applicable on back office administration and accounting services supplied to foreign clients

Maharashtra Appellate Authority of Advance Rulings (AAAR)[28] has upheld the decision of AAR which held that the principal supply of the appellant is in the nature of intermediary services and other services like back office administrative services and accounting services etc. are ancillary or incidental in nature, therefore, GST is payable on 'intermediary services' including back office administrative services and accounting services etc.

[26] Megha Engineering & Infrastructure Ltd. vs. The Commissioner of Central Tax [TS-248-HC-2019(TEL and AP)-NT]
[27] Clix Capital Services Private Limited vs. Union of India & Ors. [TS-236-HC-2019(DEL)-NT]
[28] Veservglobal Private Limited [TS-261-AAAR-2019-NT]

4. No GST on interest free security deposit, freight @ 18% applicable on composite works contract – Maharashtra AAR

- Maharashtra Advance Ruling Authority (AAR)[29] has held that GST is not applicable on interest free security deposit taken from lessee and clarified that *the deposit given in respect of supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply.* However, clarified that if the entire deposit is withheld /not returned back, then will become liable to GST.

- Maharashtra AAR[30] has held that contract for supply of goods and supply of services having cross fall breach provisions are in nature of 'Composite supply of Works Contract' service and freight charges recovered pursuant to such contract is liable to GST at 18%.

5. Notifications

- The Government has *notified*[31] the GST rate of 1% without ITC (1/3* 1.5%) for affordable residential apartments and 5% without ITC (1/3*7.5%) for other than affordable residential apartments, w.e.f. 1 April 2019, subject to fulfilment of certain conditions.

- In case of ongoing projects of construction of residential apartments, the Government has extended the due date for exercising the option of GST payment at 1%/5% (without GST) or 8%/12% (with GST) from 10 May 2019 to 20 May 2019[32].

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[29] E-Square Leisure Pvt. Ltd [TS-945-AAR-2018-NT]
[30] Siemens Limited [TS-271-AAR-2019-NT]
[31] Notification no. 3/2019-Central tax (Rate) dated March 29, 2019
[32] Notification no. 10/ 2019-Central tax (Rate) dated May 10, 2019