# Katalyst Kaleidoscope

September 2020: Tax and Regulatory Insights

## A. Income-tax Highlights

### 1. Tax Collection at Source ('TCS') broadened to cover additional transactions w.e.f October 1, 2020

Finance Act, 2020 has broadened the scope of tax collection at source under section 206C of the Income-tax Act, 1961 (the Act/ ITA) (covered in our February 2020 Budget edition of Katalyst Kaleidoscope) w.e.f. October 1, 2020 and to cover the following additional transaction under the ambit of TCS.

a) An authorised dealer receiving an amount or an aggregate of amounts of Rs. 7,00,000 or more in a financial year for remittance out of India under the 'Liberalised Remittance Scheme' of RBI (5%).
b) A seller of an overseas tour program package (5%).
c) A seller of goods (if his turnover exceeds 10 cr in the immediately preceding financial year) on consideration received from a buyer (excluding exports) in a financial year in excess of fifty lakh rupees (0.1%).

The amount of TCS can be set off against tax payable; in a sense, it is like tax paid in advance.

***Katalyst Comments:***

*This adds to the compliance burden and is contrary to the "Ease of Doing Business". The aspect of a seller of goods collecting TCS on consideration received from a buyer can be extremely cumbersome as it will lead to interconnected compliance requirements between customers and vendors.*

### 2. Delhi ITAT allows depreciation on goodwill representing workforce value, supplier contracts and other business rights obtained upon acquisition of business

Geodis Overseas Pvt. Ltd.[1] (assessee-company) acquired IBM's internal global logistics operations with IBM India Pvt Ltd, Network Solutions Pvt Ltd and IBM Daksh Business Process Services Pvt Ltd ("IBM") and recorded goodwill on the acquisition of business and claimed depreciation on it.

The assessee argued that the goodwill represents value of workforce value, supplier contracts and other business rights acquired on the acquisition of business from IBM but the AO was not satisfied by the assessee' s argument and disallowed the depreciation claimed by assessee.

[1] Geodis Overseas Pvt. Ltd vs DCIT [TS-422-ITAT-2020(DEL)]

Hon'ble Delhi ITAT, relying on the judgement of Hon'ble Delhi High Court in the case of Areva T&D India Ltd[2], held that the value of workforce value, supplier contracts and other business rights acquired on the acquisition of business is eligible for depreciation under section 32 of the ITA. Hon'ble Delhi High Court in the case of Areva T&D India Ltd had held that "business claims, business information, business records, contracts, employees and know how acquired by assessee under Slump Sale agreement are in nature of 'business or commercial rights of similar nature' specified section 32(1)(ii) and are accordingly eligible for depreciation"

***Katalyst Comments:***

*The allowability of depreciation on goodwill arising out of business restructuring has been subject to considerable judicial scrutiny beginning with the Hon'ble Supreme Court's verdict in the case of Smif securities[3]. This judgement reaffirms the judiciary's view that depreciation would be allowable on a business purchase/ slump purchase situation, more so if such transaction is not between related parties.*

### 3. Mumbai ITAT allows depreciation on 'goodwill' representing the difference between amount of negative net worth of a loss-making division and the face value of equity shares issued on merger of that division

Classic Stripes Pvt. Ltd.[4] (assessee) had claimed depreciation during the AY 2010-11 on the goodwill arising on account of de-merger of safety products division of M/s Forma Sports Pvt. Ltd. (FSPL) with the assessee company as per the Scheme of Arrangement under the Companies Act 1956, which was duly approved by the Hon'ble Bombay High Court.

The Revenue department noted that Safety Division of M/s Forma Sports Pvt Ltd was a consistent loss-making division and therefore, disallowed the claim of depreciation on goodwill on merits.

The Revenue department argued that goodwill in the instant case arose on revaluation of properties. Hon'ble Mumbai ITAT stated that Goodwill would arise on account of various factors such as continuing clients, continuing business & relationship, established set up for smooth conduct of business, continuing business, commercial and industrial rights and licenses to the successor company / merged entity. These commercial, business and industrial rights were duly acquired by the assessee company through the and due consideration was passed on for the same by way of allotment of shares. Hence, the same would factually tantamount to acquisition of goodwill.

[2] Areva T&D India Ltd vs DCIT, 345 ITR 421 (2012) (Delhi)
[3] CIT vs Smif Securities Limited (2012) 348 ITR 302 (SC)
[4] Classic Stripes Pvt. Ltd [TS-413-ITAT-2020(Mum)]

Further, Hon'ble Mumbai ITAT, relying on the decision of Hon'ble Supreme Court in the case of Smifs Securities Ltd[5] which specifically held that goodwill arising on account of amalgamation would constitute intangible asset eligible for depreciation under Section 32 of the Act, held that the assesse was entitled to depreciation in instant case.

### 4. Mumbai ITAT held that Sec. 50C is not applicable to transfer by way of contribution of 'development rights' to an AOP

Network Construction Company[6] (assessee-company) purchased development rights in respect of 7 buildings. This development right in respect of three buildings was shown on the asset side of the Balance sheet under the head 'Investments' as on March 31, 2010. Subsequently, the assessee entered into a Joint Venture agreement (AOP) and agreed to contribute the said development right as 'capital contribution'.

The revenue authorities treated the transfer of the development rights under section 50C which talks about the stamp duty valuation as the minimum value for the purpose of computing capital gains. However, the assessee's view was that a contribution into a AOP should be governed by the provisions of Section 45(3) which provides that the amount recorded by the AOP in its books shall be the basis for computing capital gains.

The Mumbai ITAT held that section 45(3) is a charging provision having two limbs joined by conjunction "AND". The first limb is a charging provision which levies capital gain tax on gains arising from contribution of capital asset in the AOP by a member and second limb is an essential deeming fiction for determining the value of consideration without which the charging provision would fail. However, section 50C of the Act only deems the value of consideration for the purpose of calculating capital gains in the transfer of capital asset from one person to another. The provisions of section 50C of the Act are not applicable in the instant case and provision of section 45(3) of the Act will be applied. This was on the basis of the principle that a special provision overrides the general.

***Katalyst Comment:***

*Where there is a general as well as a specific provision, the specific provision should overrule the general provision. Thus, in a conflict between section 45(3) and section 50C, whichever is the specific provision should override the general one [Section 45(3), in this case].*

[5] CIT vs Smif Securities Limited (2012) 348 ITR 302 (SC)
[6] Network Construction Company [TS-420-ITAT-2020(Mum)]

### 5. Karnataka HC allows indexation benefit on the cost of capital asset sold while calculating book profit for MAT as per section 115JB of the Act

Best Trading and Agencies Ltd. (assessee-company) was a special purpose vehicle holding non-manufacturing and liquid assets including real estate of Kirloskar Electric Company Ltd under an arrangement approved by the court. The assessee has declared loss in AY 2005-06 and AO assessed the assessee on book profits u/s115JB without giving the benefit of indexation on the cost of capital asset sold during the year.

Hon'ble Karnataka HC noted that by virtue of Section 115JB(5), the application of other provisions of the Act were open, except if specifically barred by the Section itself. HC observed that there was no provision in the Act to prevent the assessee from claiming indexed cost available under Section 48 of the Act of acquisition on the sale of asset in case, where the assessee was subjected to Section 115JB of the Act.

Further, HC quoting the CBDT Circular[7] and its earlier judgement of MSR & Sons Investment Ltd[8] held that if dividends are not paid by the company the provisions of section 115JB are not attracted. The assessee had not paid the dividends. The profit itself was not attracted and the question of applicability of Section 115JB did not arise. Thus, HC quashed the orders passed by the ITAT and answered the substantial questions of law in favour of the assessee and against the Revenue.

***Katalyst Comment:***

*The SC, in the case of Apollo Tyres Limited[9] held that the AO does not have jurisdiction to go behind the net profit shown in the profit and loss account, except to the extent provided in the Explanation to section 115J (now section 115JB) of the Act. However, Karnataka HC in the current case, has held that case of Apollo Tyres is distinguishable, as Section 115J does not contain a provision that other sections of the ITA will be applicable while calculating MAT payable.*

### 6. Madras HC held that slump exchange cannot be subject to capital gains under section 2(42C) read with Sec.50B

Areva T&D India Ltd (Assessee Company) has transferred its non-T&D business to M/s. ALSTOM Industrial Products Ltd under a scheme of arrangement. In exchange M/s. ALSTOM Industrial Products Ltd issued equity shares as consideration.

[7] CBDT Circular 25 No.762 dated February 11, 1998
[8] MSR & SONS INVESTMENT LTD. in I.T.A.No.769/2000 decided on September 14, 2011 (Karnataka HC)
[9] 'APOLLO TYRES LTD. VS. COMMISSIONER OF INCOME-TAX', (2002) 122 TAXMAN 562 (SC)

Hon'ble Madras HC, relying on the judgement of Hon'ble Bombay HC in Bharat Bijlee's case[10], held that the excess consideration received on the transfer of the non-T&D business could not be considered as a slump sale and therefore could not be giving rise to capital gains u/s.50B as there was no sale consideration in monetary terms, but the whole transaction was one of exchange wherein the value was paid by way of issuance of shares.

***Katalyst Comment:***

*This is another welcome decision on position of 'slump exchange' which is already established by the HC in the case of Bharat Bijlee. Such a transaction will need to pass the test of GAAR in the post GAAR era.*

### 7. In case of JDA, guidance value of land to be taken as full value of consideration and not cost of construction of development

Vivekanand Padegal (Assessee) entered into a JDA for sale of land to a developer and in consideration he would receive 50% of super built up area in the form of commercial complex. Assessee filed return of income computing Long Term Capital Gain (LTCG) in respect of the sale of land given for joint development taking guidance value of the land on the date of Joint Development Agreement. However, AO considered actual cost of construction to be incurred by developer and computed the capital gain accordingly.

The matter went to the ITAT, and ITAT held that in the facts of the present case, section 50D of the Act was applicable because the consideration to be received by the assessee was 50% of super built up area in the form of commercial complex etc. to be constructed by the builder and therefore, ITAT held that "such cost of construction to be constructed in future cannot be determined in the year of transfer".

***Katalyst Comment:***

*Earlier the Bangalore ITAT, in the case of Shankar Vittal Motor Co Ltd[11] adopted the fair market value as deemed consideration for the purpose of calculation of capital gains. However, there are contradictory decisions of the Bangalore ITAT and Hyderabad ITAT. The Hyderabad ITAT, in the case of Smt Prathima Reddy[12] and Udai Hospitals Private Ltd[13] held that cost of construction of the building alone should be adopted as sale consideration and not guidance value of land.*

[10] Bharat Bijlee Limited [TS-270-HC-2014(BOM)]
[11] *Shankar Vittal Motor Co Ltd [TS-148-ITAT-2016(Bang)]*
[12] *Smt Prathima Reddy vs. ITO [(ITA NO.1393/HYD/2010)]*
[13] Udai Hospitals Private Ltd [TS-592-ITAT-2018(HYD)]

## B. Corporate Law Highlights

### 1. MCA amended Schedule VII and Companies (CSR) Rules, 2015 to include COVID-19 related activities in the ambit of CSR.

MCA vide its circular dated August 24, 2020 has increased the activities which may be included by the Company in their CSR Activities. Now, Companies may also contribute the CSR amount towards the following:

a) R&D projects in the field of Science, Technology, Engineering and Medicine funded by the Central Government or State Government or any agency or PSU of the Central Government or State Government;

b) Autonomous Bodies established by the Department of Pharmaceuticals and Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH)

Further, by virtue of amendment[14] in Companies (Corporate Social Responsibility Policy) Rules, 2015, any Company engaged in research and development activity of new vaccine, drugs and medical devices in its normal course of business, may undertake research and development activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22 and 2022-23, subject to the following conditions:

a) such research and development activities are carried out in collaboration with any of the institutes or organizations mentioned in item (ix) of Schedule VII to the Act; and

b) details of such activity are disclosed separately in the Annual Report on CSR included in the Board's Report.

### 2. MCA appointed committee suggests Business Responsibility and Sustainability Report with the objective to have 'a Single source for all Non-Financial Disclosures'

MCA released the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business (NVGs), in 2011. It provided guidance to businesses on what constitutes responsible business conduct which were revised and released as the National Guidelines on Responsible Business Conduct (NGRBC) in 2019.

In efforts to have a single source for all non-financial disclosures by corporates, MCA appointed committee has recommended a Business Responsibility Report be called the Business Responsibility and Sustainability Report (BRSR). The Committee also proposes two formats for disclosures: a comprehensive format and a Lite version.

[14] Notification No. G.S.R. 526(E) dated August 24, 2020

**Structure of the BRSR Framework**

The BRSR has three sections and the purpose and structure of each of these three sections is given below:

- Section A: General Disclosures: The objective of this section is to obtain basic information about the company

- Section B: Management and Process: Here the company is required to disclose information on policies and processes relating to the NGRBC Principles concerning leadership, governance, and stakeholder engagement

- Section C: Principle-wise performance: Responses to Section C indicate how a company is performing in respect of each Principle and Core Element of the NGRBCs. The questions in this section have been divided into two categories:

  a) Essential: Those that are mandatory for all companies.
  b) Leadership: Those that are voluntary and which provide an opportunity for companies to present their impacts and outcomes

**BRSR Lite version**

A pared down version of the BRSR format has been proposed, to make it easier for all smaller companies to begin reporting on sustainability reporting related issues. This again has the Essential and Leadership category of questions, but fewer in number, and seeks information which such companies should be able to provide.

## 3. Various extension of due dates granted by MCA under Companies Act, 2013

Keeping current scenario in mind, MCA, to ease compliance burden on the Companies, granted following extensions:

a) The last date to conduct Annual General Meeting of a Company is extended to November 30, 2020.

b) The last date for submission of Cost Audit report for the Financial Year 2019-20 is extended to November 30, 2020.

## C. Securities' Laws Highlights

### 1. Frequently Asked Questions on SEBI (Buy-Back of Securities) Regulations, 2018

SEBI has issued an updated set of Frequently Asked Questions in August, 2020 (FAQs) on SEBI (Buy-back of Securities) Regulations, 2018 clarifying following terms:

a) Manner in which Company can buy back its shares;
b) Maximum limit to buy-back shares without passing shareholders' resolution;
c) Process to tender shares for buy-back in the tender offer method;
d) Manner in which a person can participate in the buy-back process if one couldn't receive tender/ offer form:
e) Manner in which the Company decides the acceptance of shares tendered for buy-back;
f) When will one receive intimation about acceptance of shares for buy-back by shareholder;
g) When will one receive consideration/ the share certificate post acceptance/ rejection by the Company in the tender offer method;
h) Type of escrow account to be used in the buy-back offer process;
i) Mode of dispatch of letter of offer.

### 2. SEBI implements the automated system for disclosures required under Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 (PIT Regulations)

SEBI, vide circular[15] dated September 9, 2020, implemented the system driven disclosures in PIT Regulations and the procedure for implementation is as follows:

a) The various formats and timelines for sharing of data shall be standardized, as agreed upon by the depositories and exchanges.

b) Listed company to provide the information including PAN number of the promoter group, designated persons and directors to the designated depository. The information shall be provided within 10 days from the date of this circular.

c) The designated depository shall share the information received from the listed company with another depository.

d) In case of any subsequent update, the listed company to update the information with the designated depository on the same day.

[15] Circular no. SEBI/HO/ISD/ISD/CIR/P/2020/168 dated September 9, 2020

e) Based on the PAN of First holder/Demat account number(s), the depositories shall tag such Demat accounts in their depository systems at ISIN level.

f) The designated depository shall also share with the stock exchanges, company-wise details of entities. In case of PAN exempt entity, respective depository shall share the Demat account number(s) details with the stock exchanges.

g) The depositories shall provide the specified data pertaining to the tagged Demat account(s) separately to the stock exchanges on daily basis.

h) Based on above, stock exchanges will identify the transactions carried out on their trading system.

i) Such identified trades to be shared by the stock exchange with all other stock exchanges where the company is listed on daily basis.

j) In case of any discrepancy, the issue shall be resolved by listed company, stock exchanges and depositories in coordination with one another.

### 3. Revised Criteria for Asset Allocation in Multi Cap Funds

SEBI vide circular[16] dated September 11, 2020 has issued following criteria for investment in order to diversify the underlying investments of Multi Cap Funds across the large, mid and small cap companies.

Minimum investment in equity & equity related instruments should be 75% of total assets in the following manner:

- Large cap companies - Minimum 25% of total assets
- Mid cap companies - Minimum 25% of total assets
- Small cap companies - Minimum 25% of total assets

## D. RBI and Foreign Exchange Regulations Highlights

### 1. Reserve Bank of India issues key financial ratios[17] and its threshold for the Resolution Framework for COVID-19-related Stress

Reserve Bank of India has issued a Resolution Framework[18] for COVID-19-related Stress as on August 6, 2020 in which Reserve Bank to constitute a Committee which shall recommend a list of financial parameters in respect of eligible borrowers to borrow from Financial

[16] SEBI/HO/IMD/DF3/CIR/P/2020/172 dated 11 September, 2020
[17] RBI/2020-21/34 - DOR.No.BP.BC/13/21.04.048/2020-21
[18] RBI/2020-21/16 - DOR.No.BP.BC/3/21.04.048/2020-21

Institutions. For which RBI had set up an Expert Committee with Shri K. V. Kamath as the Chairperson. The Expert Committee has since submitted its recommendations to the Reserve Bank on September 4, 2020, which have been broadly accepted by the Reserve Bank.

Accordingly, all lending institutions to mandatorily consider the following key ratios while finalizing the resolution plans in respect of eligible borrowers under Resolution Framework.

a) Total Outside Liabilities / Adjusted Tangible Net Worth (TOL/ATNW)
b) Total Debt / EBITDA
c) Current Ratio
d) Debt Service Coverage Ratio (DSCR)
e) Average Debt Service Coverage Ratio (ADSCR)

Also, RBI provided a sector-specific threshold for each of the above key ratios that should be considered by the lending institutions in the resolution assumptions with respect to an eligible borrower.

### 2. RBI issues a framework to authorize a Pan-India Umbrella Entity for Retail Payments

RBI issued a Framework to set-up Pan-India umbrella entity / entities focusing on retail payment systems on August 18, 2020. This framework contains norms with respect to Capital requirement, eligible activities, eligibility of Promoters, Procedure for application and its processing. RBI has invited applications from eligible companies by February 26, 2021. Following are some key parameters: -

a) Such entity to be a 'for-profit' or a Section 8 Company incorporated in India under the Companies Act, 2013.

b) The umbrella entity shall be a Company authorised by Reserve Bank of India (RBI) under Section 4 of the PSS Act, 2007.

c) Promoters must be Resident as per FEMA having 3 years' experience in the payments ecosystem as Payment System Operator (PSO) / Payment Service Provider (PSP) / Technology Service Provider (TSP).

d) Any entity holding more than 25% of the paid-up capital of the umbrella entity shall be deemed to be a Promoter.

e) The Promoters / Promoter Groups, to be in conformity with the Reserve Bank's 'fit and proper' criteria.

f) The umbrella entity to have a minimum paid-up capital of INR 500 crore. No single Promoter / Promoter Group to have more than 40% investment in the capital of the umbrella entity.

g) A minimum net-worth of INR 300 crore shall be maintained at all times.

h) The umbrella entity to conform to the norms of corporate governance along with 'fit and proper' criteria for persons to be appointed on its Board.

## E. Other Highlights

### 1. Reduction in rate of stamp duty on transfer of immovable Property in Maharashtra.

The Maharashtra Government has vide notification[19] dated August 28, 2020 reduced the stamp duty chargeable under Article 25(b) of Schedule-I appended to the said Act, on the instrument of Conveyance or Agreement to sell of any immovable property by;

- 3% in Mumbai District and Mumbai Sub-Urban District, and by 2% in Rest of the State of Maharashtra for the period starting from September 1, 2020 and ending on December 31, 2020 and

- 2% in Mumbai District and Mumbai Sub-Urban District and by 1.5% in Rest of the State of Maharashtra, for the period starting from January 1, 2021 and ending on March 31, 2021.

## F. Goods and Service Tax Highlights

### 1. The Gujarat High Court has allowed the refund of unutilized ITC of IGST distributed by ISD to SEZ unit.

The Gujarat High court20 allowed the refund of unutilised ITC of IGST distributed by ISD to SEZ unit-based section 16 of the IGST Act which provides that zero rated supply is to avoid the cascading effect of taxation including the zero-tax liability for exports. Further, the entire scheme of the GST does not restrict any distribution of common credit by an ISD to an SEZ unit. Therefore, on a conjoint reading of section 16 of the IGST Act and section 54 of the CGST Act, the petitioner is entitled to get the refund of unutilized ITC lying in the Electronic Credit Ledger.

***Katalyst comments:*** *Welcome decision by the Gujarat High court. The ITC distribution mechanism of GST provides for distribution of ITC by ISD to SEZ also and in view of section 16 of the IGST Act read with section 54 of the CGST Act, SEZ is entitled for refund of un-utilized ITC distributed by SEZ.*

[19] Mudrank-2020/CR.No.136/ M-1(Policy)
[20] In case of Britania Industries Ltd. Vs. UOI [2020-TIOL-1495-HC-AHM-GST]

### 2. Interest on delayed payment of tax is payable on "net liability"

The Government has finally issued a notification 21 whereby amendment made in section 50(1) of the CGST Act regarding interest on delayed payment applicable on 'net liability' (i.e. cash payment of tax/balance tax post utilisation of ITC) has been notified and said notification is effective from September 1, 2020. Also, for the period July 1, 2017 to August 31, 2020, non-levy of interest by both Central and State Government has been clarified by way of a press release dated August 26, 2020.

***Katalyst comments**: The captioned notification has put an end to the long pending issue of interest on delayed tax payment payable on 'net liability' or 'gross liability'.*

### 3. No GST is payable on transportation charges recovered by employer from employee

The Maharashtra AAR22 has held that in view of schedule III of the CGST Act, there exists an employer-employee relationship and hence, no GST is applicable on amount recovered by employer from employee for transportation facilities provided to employees in non-air-conditioned bus for commuting to/from workplace. Also, as per provisions of section 17(5) of the CGST Act, w.e.f. February 1, 2019, ITC of GST paid on leasing, renting or hiring of motor vehicles, for transportation of persons having seating capacity of more than 13 persons is available. Hence, ITC of GST paid for hiring of motor vehicle is available to the applicant. The AAR has also clarified that ITC available to the employer is restricted to the cost borne by the employer.

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[21] Notification no 63/2020-CT dated August 25, 2020
[22] In the matter of Tata Motors Limited [TS-745-AAR-2020-NT]