KATALYST ADVISORS

Katalyst Kaleidoscope

April 2022: Tax and Regulatory Insights

SUMMARY OF CONTENTS

A. Income tax highlights

1. SC: Assessment on a Transferor Company not invalid merely on account of Amalgamation of Transferor Company with Another Company[1]

Recently, the Supreme Court held that the income-tax proceedings would not become infructuous or invalid merely because the proceedings were initiated on a Transferor Company which was amalgamated with another company. The basic premise was that in case of amalgamation, the business undertaking of the Transferor Company continues as a going concern and therefore, continues with the Transferee Company post the amalgamation. Therefore, while legally the Transferor Company ceases to exist, the business undertaking of the Transferor Company continues with the Transferee Company, unlike in case of winding up. Further, all tax liabilities and proceedings in relation to the Transferor Company also devolve onto the Transferee Company post the amalgamation, and therefore, the income-tax proceedings would continue to be pressed as against the Transferee Company.

Katalyst Comments:

While the above decision is law of the land vis-à-vis past years, this controversy is now put to rest by insertion of Section 170(2A) of the Income-tax Act, 1961 vide Finance Act, 2022. In the context of business reorganization (involving amalgamation or de-merger of business), the amendment also provides that the income-tax assessment or other proceedings pending or completed on the predecessor (i.e., amalgamating or demerged company), shall be deemed to have been made on the successor (i.e., the Transferee Company amalgamated or resulting company), and therefore, cannot be treated as void-ab-initio.

2. Mumbai ITAT upholds addition on account of Sec. 56(2)(viib) resulting from rounding-off of fair market value computed as per IT rules[2]

The Assessee was engaged in real estate business and allotted 1.25 lakh equity shares to another company, at a premium during AY 14-15. The revenue found FMV of the shares was determined at Rs. 3,560.77 per share as per Rule 11UA, but the shares were issued at Rs. 3,600 per share and made addition of Rs. 48.75 lakh based on differential of Rs. 39 per share under Section 56(2)(viib).

The assessee contended that the assessee had determined the fair market value of share as per the method prescribed u/r.11UA(c). However, for the purpose of convenience at the time of allotment of shares the value was rounded off to the nearest multiple of 100, hence, there

[1] Mahagun Realtors Pvt Ltd [2022] 137 taxmann.com 91 (SC)[5th April, 2022]
[2] Royal Accord Realtors Pvt. Ltd. [TS-281-ITAT-2022(Mum)] dt. 4th March, 2022

was a difference of Rs.39 per share. The rounding off of fair market value to the nearest multiple of 100 was done with a bona-fide intention and not to take any unfair benefit. There is a marginal difference of 1.10% in the value of shares allotted and their fair market value in accordance with Rule 11UA.

On perusal of Section 56(2)(viib), the Tribunal observed that the provisions are attracted when the consideration for issue of shares exceeds fair market value of the shares. It further noted that if the Legislature intented to provide rounding off, it would be specifically provided under Section 56(2)(viib). Relying on the Hon'ble Kolkata Tribunal ruling in Shresth Dealers, it observed that round off to the value of shares even to the nearest rupee was not permitted and explained that the Apex Court has frequently held that in a taxing statute, one has to look merely at what is clearly said in the section, there is no room for any intendment, there is no concept of equity in tax law, nothing is to be read in, nothing is to be implied and one has to look at plain language of the provisions of the section.

Thus, it held that the provisions of section 56(2)(viib) or Rule 11UA are plain, clear and unambiguous and nowhere provide for rounding off to nearest rupee or multiple of ten or hundred.

Katalyst Comments: *The above ruling is an example of literal implementation of the law leaving little room for operational flexibility and overlooking the substance of the transaction and intention of the taxpayer; an example of Ease of Doing Business being impacted for minor issues and needless litigation.*

3. Bombay High Court holds that sum withdrawn by buyer from Escrow Account, deducible for capital gains computation[3]

In the case of Dinesh Vazirani, the Bombay High Court was faced with a situation where part of the consideration for sale of shares was deposited in an escrow account, but was withdrawn by the purchaser towards liabilities contemplated under the Share Purchase agreement ("SPA"). The matter went up to the High Court in litigation and the High Court held that the consideration under the SPA was not an absolute amount and therefore, the adjustment towards the liabilities effectively reduced the consideration, and capital gains should be computed on that basis.

The High Court relied on the landmark judgment of the Supreme Court in the case of CIT vs Shoorji Vallabhdas and Co (1962) (46 ITR 144) and applied the real income principle, to hold that consideration which has neither accrued nor received, cannot be brought to tax.

[3] Dinesh Vazirani [TS-274-HC-2022(BOM)] dated 8th April, 2022

4. CBDT notifies ITR forms for AY 2022-23[4]

CBDT has notified the ITR forms for AY 2022-23 vide notification dt 30th March, 2022. Key changes are summarized below:

ITR	Assessee	Key Changes
ITR-3	For individuals and HUFs having income from profits and gains of business or profession	In Part A – Filing Status the assessee is required to provide details of residential status specifically in light of amendments introduced in Finance Act 2020 and 2021: • Resident Assessees leaving India for employment outside India or NRIs outside India visiting India, now have an option to select if he/she was in India for a period of 182 days or more during the previous year and 365 days or more within the preceding 4 years in terms of Explanation 1(a) and Explanation 1(b) to Section 6(1)(c). • Resident but not Ordinarily Resident Assessees are required to provide the information in terms of Section 6(6)(c) and Section 6(6)(d) read with Section 6(1A). Accordingly, those having income from Indian sources in terms of the Sec. 6(1A) exceeding INR 15 lakhs now have options to select depending upon their stay in India to determine their residential status.
ITR-3	For individuals and HUFs having income from profits and gains of business or profession	Schedule OS dealing with income falling under the head of Other Sources has been amended to include the following: • Disclosure of dividend income to be bifurcated into of dividend income covered u/s 2(22)(e) and other dividend income. • Separate disclosure of interest accrued on PF contributions to the extent taxable under first and second proviso to Sections 10(11)/(12).

[4] Notification No. 21/2022 dt. 30th March, 2022

ITR	Assessee	Key Changes
		• Disclosure of income from retirement benefit account maintained in a country notified or not notified under Section 89A. • Disclosure of investment income of NR chargeable at special rates u/s 115E. • Eligible interest expenditure for deductions u/s 57. • Separate slot for income claimed for relief from tax u/s 89A. • Separate disclosure of dividend incomes including pass through incomes covered under Sections 115A(1)(a)(i) and 115AD(1)(i) taxable @ 20% and Sections 115AC and 115ACA taxable @ 10%. • Disclosure of income from retirement benefit account maintained in country notified u/s 89A but not claimed for relief • Disclosure of income chargeable at DTAA Rates
ITR-6	For Companies other than companies claiming exemption under Section 11	Schedule OS dealing with income falling under the head of Other Sources has been amended to include the following: • Bifurcation of dividend income as deemed dividend under Section 2(22)(e) and other dividends, now required. • Bifurcates interest income from bonds and interest income from GDRs purchased in foreign currency by non-residents – chargeable under Section 115AC • Requires specific disclosure in respect of dividend income received – (i) by FII and (ii) by specified fund. Also, specific disclosure of income other than dividend received by specified fund is required. • In respect of deduction under Section 57, new row added for providing computed value of eligible interest expenditure. New fields on Dividend income under different sections based on chargeability to tax (Section

ITR	Assessee	Key Changes
		115A(1)(a)(i), 115AC,115BBD, and 115AD(1)(i)) is added in information about accrual/receipt of income from Other Sources
ITR-6	For Companies other than companies claiming exemption under Section 11	A New schedule – Schedule IF – has been inserted wherein information regarding unincorporated entities – including NAME, PAN, audit requirement, applicability of Section 92E, share percentage, amount of profit share and capital balance is required to be disclosed.

B. Corporate Law Highlights

1. Bombay High Court upholds shareholder's right to call an extraordinary general meeting in Invesco vs Zee case [5]

The Bombay High Court, in the case of Invesco Developing Markets Fund v/s Zee Entertainment Enterprises Limited, was dealing with a situation where Invesco held about 17.88% of Zee, and was seeking removal of existing directors and appointment of new independent directors. On 11th September, 2021, Invesco issued a requisition notice to Zee in terms of 100(2)(a) in the Companies Act 2013 calling for an EGM for the purpose of removing 3 independent directors of the company and seeking appointment of 6 new independent directors "subject to the approval of Ministry of Information & Broadcasting". On 22nd September, 2021, Zee announced the approval and execution of a non-binding term sheet with Sony Pictures Networks Private Limited (Sony India) and promptly thereafter, Invesco again addressed a letter to Zee calling upon it to comply with the requisition for calling an EGM. Invesco filed a company petition under section 98(1) read with Section 100 before the NCLT to the effect that the NCLT should order an EGM to be called in the context of the fact that Zee had not done so. Zee's board concluded that the requisition was invalid/illegal and rejected the requisition, and also filed a suit before the Bombay High Court for the court to declare the requisition notice as ultra vires and bad in law.

A single judge of the Bombay High Court granted an injunction restraining Invesco from taking any action or steps including calling and holding EGM under section 100(4) and also held that the resolutions sought to be passed were bad in law. Invesco challenged the judgement before a Divisional Bench of the Bombay High Court. Invesco argued that the Court cannot interfere

[5] Invesco vs Zee APPEAL (L) NO.25420 OF 2021 dated 22nd March, 2022

with the statutory right of a shareholder to call for an EGM and reliance was placed on the Supreme Court decision in the case of LIC vs. Escorts (1986) 1 SCC 264.

The Bombay High Court set aside the single judge judgement and held that the EGM needs to be called by Zee. Although not required to do so, the High Court also concluded that the resolutions proposed in the requisition are neither illegal nor incapable of being lawfully implemented and consequently, set aside the single judge finding in this regard on all counts.

Katalyst comments:

While the battle between the two groups has been resolved out of court, the judgement reiterates the rights granted to a shareholder to protect their interests.

2. NCLAT rules that simultaneous proceedings can be initiated by a creditor against the principal borrower and corporate guarantor[6]

The NCLAT has ruled that simultaneous proceedings can be initiated by a creditor against the principal borrower and corporate guarantor being surety and that both have co-extensive liability. The NCLAT relied on the Supreme Court judgement in the case of Laxmi Pat Surana[7] wherein the Supreme Court had observed that if there is a default by the corporate debtor, the status of the guarantor metamorphoses into a debtor within the meaning of Section 3(8) of the IBC. Accordingly, it was held by the NCLAT that the corporate insolvency resolution proceedings can be initiated by the creditor against the principal borrower and the guarantor.

3. Report of Company Law Committee[8]

In September 2019, the MCA had constituted a Company law committee under the Chairmanship of Secretary, MCA, with the objective of prioritising Ease of Living/ Ease of Doing Business ('EODB') to "law abiding corporates" and to address emerging issues. The terms of reference of the committee included the following:

- Analysing nature of offences in relation to what could be categorised as "civil wrongs".
- Examining the feasibility of introducing settlement mechanism under Companies Act.
- Measures to de-clog and improve functioning of NCLT.

[6] Babumanoharan vs. Indian Bank & Ors [LSI-189-NCLAT-2022(CHE)] dt. 31st March, 2022
[7] L axmi Pat Surana vs. Union Bank of India" Civil Appeal No. 2734 of 2020 (SC) dated 26th March, 2021
[8] Company Law Committee Report (2022) (CLC-2022) dt. 21st March, 2022

- Identifying of specific provisions to bring about greater Ease of Living for corporate stakeholders, including review of forms.

There are more than 25 issues on which recommendations have been made by the committee and some of the key ones are mentioned in the table below:

#	Issue	Observations and Recommendations of the Committee	Proposed amendments to CA-13
1.	Replacing affidavits with self-declaration	The requirement of furnishing affidavits should be replaced with filing declarations under the provisions of CA-13 and Rules made thereunder, except for those provisions involving filing affidavits before the NCLT, NCLAT and RD. The Central Government may prescribe the format for filing such declaration.	• Amendment to Section 68 (6) to permit a company to file a self-declaration in place of an affidavit when purchasing its own shares. • Amendment to Section 374(c) to permit a company to file a self-declaration in place of an affidavit when seeking registration under Part I of Chapter XXI.
2.	Clarifying provisions on buy-back of securities	'Free reserves' should be explicitly included in calculating the buy-back of equity shares.	• Amendment to the proviso to Section 68 (2) to explicitly include 'free reserves' while calculating the threshold of Amendment to the proviso to Section 68 (2) to explicitly include 'free reserves' while calculating the threshold of twenty-five per cent in case of buy-back of equity shares. • Amendment to Explanation to Section 68 clarifying that only those stock options which have been exercised can be bought back by the company.
3.	Holding general meetings through the use of technology	CA-13 should enable companies to hold general meetings, i.e., AGMs and EGMs physically, virtually, and in hybrid mode. Where the meeting is to be conducted entirely in electronic	• Amendment to Section 96 to enable companies to hold AGMs in electronic mode in such manner as may be prescribed. • Amendment to Section 100 to enable companies to hold EGMs

#	Issue	Observations and Recommendations of the Committee	Proposed amendments to CA-13
		mode, the notice period for such meetings should be reduced to such period as may be prescribed by the Central Government.	in electronic mode in such manner as may be prescribed. • Insertion of a proviso in Section 101 to provide that a general meeting held in electronic mode may be called by giving such notice as may be prescribed
4.	Reviewing provisions on merger and amalgamation	• A twin test requiring approval by (i) majority of persons present and voting at the meeting accounting for seventy-five per cent, in value, of the shareholdingof persons present and voting; and (ii) representing more than fifty per cent, in value, of the total number of shares of the company, should be mandated for approval of fast-track mergers under Section 233. • Special Benches of the NCLT should be allowed to be constituted by the Central Government to deal with matters of economic importance relating to mergers and amalgamation or corporate restructuring or specialised IBC cases.	• Amendment to Section 233 to include a twin test requiring approval by (i) majority of persons present and voting at the meeting accounting for seventy-five per cent, invalue, of the shareholding of persons present and voting; and (ii) representing more than fifty per cent, in value, ofthe total number of shares of the company for approval of fast-track mergers. • Amendment to Section 419 to enable the Central Government to constitute special Benches of the NCLT, which may deal with specific powers and functions of the NCLT, as may be prescribed.
5.	Recognising SPACs	There should be an enabling provision under CA-13 to recognise SPACs and allow entrepreneurs to list a SPAC incorporated in India on domestic and global exchanges. Provisions on relaxing the requirement to	Insertion of a new chapter forthe recognition and regulation of SPACs.

#	Issue	Observations and Recommendations of the Committee	Proposed amendments to CA-13
		carry out businesses before being struck off and providing exit options to the dissenting shareholders of a SPAC if they disagree with the choice of the target company identified must also be laid down in CA-13.	

C. SEBI/ FEMA

1. SEBI amends FAQs on SEBI Takeover Regulations

SEBI has updated its FAQs[9] on the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 ("SAST Regulations"); the key changes are broadly in relation to the following:

a) Implications on delayed payment pursuant to an open offer:

As per the SAST Regulations, an Acquirer is required to complete the payment of consideration to shareholders who have accepted the open offer within 10 working days from the date of closure of the open offer. SEBI has now clarified that if there is a delay in payment of consideration (other than nonreceipt of statutory approvals), in accordance with provisions of Regulation 18(11A) of Takeover Regulations, acquirer would have to pay interest for the period of delay at the rate of 10% per annum.

b) Disclosures required to be made in terms of Takeover Regulation:

SEBI has clarified disclosure requirements and provided that the following will also have to be disclosed:

- Acquisition or sale of 2% or more of shares or voting rights by person holding 5% or more of the same;
- The Promoter of every listed Company shall now have to specifically disclose "detailed reasons for encumbrance" if and when the combined encumbrance by the

[9] FAQs Dt. 30th March, 2022

promoter along with PACs with him equals or exceeds either 50% of their shareholding in the company or 20% of the total share capital of the company.

c) Implications of System Driven Disclosures:

From 1st April, 2022, SEBI has decided to automate the process of filing of disclosures as prescribed under Regulations 29 and 31 of SEBI (SAST) Regulations at stock exchange(s) level for the companies listed on nationwide stock exchanges.

Under SDD, relevant disclosures shall be disseminated by the Stock Exchanges based on aggregation of data received from the Depositories, without human intervention. From April, the requirement of submitting physical disclosures shall be dispensed with and SDD will initiate. However, the acquirers/sellers shall be obliged to verify the same at time of dissemination on stock exchange and bring to the notice of stock exchanges immediately in case of any discrepancy. SEBI has also issued the guidelines on how the SDD will work and the entities that will be required to continue submitting the manual disclosures.

d) Delisting related issues:

SEBI has clarified that an acquirer can attempt to delist the target company at the time of making an open offer for acquiring shares or voting rights or control of a target company in terms of sub-regulation (1) of regulation 3, regulation 4 or regulation 5. SEBI has also clarified (i) whether the delisting can be done if the intent was not declared, (ii) conditions in which the acquirer is not permitted to attempt delisting, (iii) basis and factors of determination of the price in the event the acquirer intends to delist the target company under regulation 5A at the time of making an open offer and related issues.

D. Goods and Service Tax highlights

1. Input tax credit ('ITC') for construction of warehouse to be rented out for storage is not available

Haryana Appellate Authority of Advance Ruling ('AAAR')[10] has upheld the decision given by the AAR and held that no ITC of inputs and capital goods used for construction of warehouse to be rented out for storage purpose is available in view of section 17(5) (d) of the CGST Act. The AAAR also held that the decision of Orissa High Court in case of Safari Retreats Pvt. Ltd is not binding in the instant case as the said decision has been challenged by the revenue.

[10] In the matter of Dhingra Trucking Pvt. Ltd [TS-1268-AAAR(HAR)-2020-GST]

Katalyst Comment: *The Orissa High Court has allowed the ITC on inputs used for construction of mall. Against said judgment, the Revenue has filed a SLP before the Supreme Court which is presently pending after notice of admission. Till the time the issue attains finality, this decision is binding to the Haryana AAAR also. The Government should amend the Law suitably to allow the ITC on inputs used for construction of property to be given on rent in future and also for construction of property for own use.*

2. No input tax credit relating to canteen services provided to employees and on gift-distribution to agents and customers is not available

Haryana AAAR[11] has held that ITC of canteen services provided to the employees is not available as it is not mandatory to provide this service as per the Factory's Act. These services are covered under the category of 'food and beverages' as per section 17(5) of the CGST Act and ITC of the same is available if the output supply is also of the same category i.e., 'food and beverage'. Further, the AAAR has also denied the ITC benefit of gift items namely, sweets, dry fruits, electronic items and gold-silver coins etc. as these items have been considered for personal purpose of the applicant and not for the business promotion.

Katalyst Comment: *The ITC of canteen services provided at factory locations is available due to the mandatory requirement of providing food to employees as per the Factory's Act. However, the same has been classified under the category of 'food and beverage' and ITC of the same has been denied. Further, ITC of gift items such as sweets, dry fruits, electronic items and gold-silver coins etc. are for the promotion of business and same cannot classified as items for personal use and ITC of the same should not be denied.*

3. Preferential location service is liable to GST at 18% without the benefit of abatement

Haryana AAAR[12] has held that preferential location service charges ('PLS') collected along with consideration for sale of properties attracts GST at 18% (without abatement) where sale/transfer of property has taken place before issuance of completion/occupancy certificate ('CC'/'OC'). Further, PLS collected after issuance of CC/OC is also covered under the purview of supply.

Katalyst Comment: *In the matter of DLF Ltd [TS-1266-AAAR(HAR)-2020-GST], the West Bengal AAAR has also held that the PLS is liable to GST at 18% (without abatement). However, the instant ruling differs in the aspect of classification. The Haryana AAAR has held that classification for PLS collected before issuance of CC/OC is 99722 (Real Estate Services on a fee*

[11] In the matter of Muasashi Auto Parts India Pvt. Ltd. [TS-1269-AAAR(HAR)-2020-GST]
[12] In the matter of DLF Ltd [TS-1266-AAAR(HAR)-2020-GST]

or commission basis or on contract basis) and PLS collected after issuance of CC/OC is 997213 ('Trade Services of Buildings').

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