

Katalyst Kaleidoscope

April 2023: Tax and Regulatory Insights

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A. Income Tax highlights

1. SC¹: Loss on assignment of loan allowed as a capital loss

The assessee had advanced a loan to its Indian subsidiary. Subsequently, the assessee assigned the loan to another group company at a very low value and thereby assessee claimed the capital loss on assignment of loan. However, the tax authorities disallowed the capital loss on the premise that the loan is not a 'capital asset'.

The Supreme Court dismissed the Special Leave Petition of the tax department against the order of the High Court, wherein the High Court held that 'capital asset' as defined in Section 2(14) of the Act is of wide import and include 'property of any kind'. The Revenue has not been able to point out any of the exclusion clauses being applicable to a loan. Hence, the loan advanced is a 'capital asset' and loss on assignment of capital advance is a capital loss.

Katalyst comments:

This is a very welcome judgement; however, justification of the value of assignment needs to be factored in.

2. SC²: Determination of Transfer Pricing constitutes "substantial question of law"; ITAT not the final authority

Transfer Pricing issues are highly subjective and litigative, and hitherto, it has been usually interpreted that transfer pricing determination is a "question of fact" and not a "question of law", and therefore, the matter would normally end with the Income Tax Appellate Tribunal. However, the Supreme Court has held, reversing the Karnataka High Court judgement (in a batch of matters led by Soft Brands/SAP Lab on issue of comparable selections), that:

- there cannot be any absolute proposition of law that, in all cases where the Tribunal has determined the arm's length price, the same is final and cannot be the subject matter of scrutiny by the High Court in an appeal under Section 260A of the IT Act ;
- it is always open for the High Court to examine in each case whether while determining the arm's length price, the guidelines laid down under the Act and the price and the findings recorded by the Tribunal while determining the arm's length price are perverse or not.

Accordingly, the cases before the Supreme Court have been remitted back before the concerned High Court to decide and dispose off the appeals afresh, in the light of the Supreme Court judgement and to examine whether the ITAT has fulfilled the guidelines laid down under the Act and the rules while determining the arm's length price.

¹ CIT v Siemens Nixdorf Information Systemse GMBH Petition(s) for Special Leave to Appeal (C) No(s). 7350/2020 dated April 11, 2023

² SAP Labs India Pvt Ltd v ITO [TS-225-SC-2023-TP] dated April 19, 2023

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Katalyst comments:

This judgement will open up substantial more litigation and will create further uncertainty in the minds of MNCs in the context of inbound investments. Matters like transfer pricing are extremely subjective and involve substantial facts, and it is difficult for any High Court to get into such matters in a meaningful manner. Unfortunately, however, the reality is that one is faced with the finality of the Supreme Court judgement and companies/MNCs will have to deal with it. One possible way is to go in for Advance Pricing Arrangement; here again, unfortunately, the long pendency (the backlog is approximately 700, and last year, 95 were signed) will be another challenge to deal with.

3. SC³: Validity of revisionary order on cost of improvement pursuant to settlement amount paid under family settlement arrangement

The assessee sold immovable property for a consideration of Rs. 33 Cr, and offered long term capital gains of Rs. 1.21 Cr, after claiming deduction of payment pursuant to arbitration award of Rs. 31.05 Cr paid by the assessee to three shareholders who were family members; the arbitral award was considered as a 'family settlement'. The computation of capital gains was initially accepted by the tax authorities; however, the Commissioner of Income Tax in its revisionary order did not allow deduction of arbitration award on the basis that the assessee was the clear owner of the property and there was no encumbrance preventing the sale of the property.

The Supreme Court held that the arbitration award paid to family members pursuant to family settlement arrangement did not lead to acquisition of any additional interest in the immovable property already acquired by the assessee and hence, cannot be considered as the cost of improvement while computing capital gains. Accordingly, the Supreme Court upheld the revisionary order of Commissioner of Income tax by stating that the Assessing Officer erred in allowing additional deduction while computing capital gains.

Katalyst comments:

Though the aforesaid judgement dwells upon the validity of revision order, the principle in relation to cost of improvement, especially in course of family arrangement, is an important aspect to note. The key issue is that the cost/expenditure incurred must be linked to the asset (such as removing a title encumbrance).

4. SC⁴: No penalty on belated payment of withholding tax

The Supreme Court held that penalty under Section 271C of the Act is applicable only on non-withholding of tax and not on account of delayed payment of withholding tax. The consequences on non-payment/belated remittance of withholding tax would be under Section 201(1A) ('interest') and 276B ('prosecution proceedings') and not under Section 271C ('penalty') of the Act. The Supreme Court also held that that penal provisions are to be

³ Paville Project Pvt. Ltd (SC) Civil Appeal No. 6126 OF 2021 (@ SLP (C) NO. 13380 OF 2018) dated April 6, 2023

⁴ US Technologies International Pvt. Ltd. & Others v CIT (SC) Civil Appeal No. 7934 of 2011 dated April 10, 2023

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interpreted literally and nothing can be added or taken out from the provisions imposing penalty.

5. SC⁵: Profits from DEPB and duty drawback schemes not eligible for profit-linked deduction

The Supreme Court held that profits from Duty Entitlement Passbook ('DEPB') and duty drawback schemes (covered by Section 28 of the Act) are ancillary in nature and cannot be construed as 'profits derived from industrial undertaking' and therefore, not eligible for deduction under Section 80-IB of the Act.

Katalyst comments:

There are now relatively very few exemptions/deductions in the Income Tax Act and therefore, to that extent, on an ongoing basis, this judgement would have less relevance. However, for certain provisions such as under Section 115BAB relating to new manufacturing companies, set up on or before 31st March 2024, there is a provision that where the total income includes "income which has not been derived from nor is incidental to the manufacturing or production" activity, the 15% concessional rate shall not apply on such income. The above judgement could impact such a provision.

6. Bangalore ITAT⁶ : Indian subsidiary not a dependent agent of foreign company

As per the facts of the given case, Google India Pvt Ltd ('Google India') acted as a distributor of AdWords program for Google Ireland. As per the distributorship agreement, Google India raised invoices on the advertiser in its own name. Further, neither the distribution agreement with Google Ireland nor the standard contract with the advertisers in India contained any clauses giving the assessee authority to bind Google Ireland in India, being an important test for principal-agent relationship. Thus, Google Indian was held not to be a dependent agent of Google Ireland in India.

Katalyst comments:

In the digital era, this is once again a welcome order by Bangalore Tribunal. The underlying agreement and conduct of parties are of prime importance for determining tax liability in India.

7. Mumbai ITAT⁷: Scheme of Arrangement in accordance with policy decision of the Government not a colourable device

Idea Cellular (ICTIL) is a 100% subsidiary of Aditya Birla Telecom (ABTL), which, in turn, is a 100% subsidiary of the assessee. The assessee, under a court approved scheme of arrangement, transferred its Passive Infrastructure Assets (PIA) to its wholly owned subsidiary ICTIL at nil value. Subsequently, ICTIL amalgamated into Indus Towers, resulting in transfer of PIAs to Indus Towers. Also, by a separate scheme of arrangement, the telecom undertaking of ABTL was demerged into the assessee and accordingly, pursuant to amalgamation and demerger, the investment of ABTL in shares of Indus Towers was received by the assessee and was revalued in its books. The tax authorities held that the entire transaction of demerger and

⁵ Saraf Exports v CIT (SC) Civil Appeal No. 4822 OF 2022 (@SLP (C) NO. 17539 OF 2016) dated April 10, 2023

⁶ Google India Pvt Ltd v ACIT ITA No.374 & 362/Bang/2013 dated March 31, 2023

⁷ Vodafone Idea Ltd V ACIT (Mumbai ITAT) ITA No.2350/Mum/2018 dated March 31, 2023

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merger was a colourable device and the difference in revalued value of shares and book value of PIAs was taxable as a benefit under Section 28(iv) of the Act.

The ITAT observed that, since the scheme of demerger and the merger had been duly approved by the High Court and was in accordance of the policy decision of Government of India, there is no colourable device involved at all. Further, if the PIAs have been transferred to ICTIL (by way of demerger) and subsequently to Indus Towers (by way of merger) for nil consideration, the benefit, if any, on this entire transaction, would only arise to ABTL and certainly not the assessee herein, and thus, provisions of Section 28(iv) of the Act are not applicable in the hands of the assessee.

8. Mumbai ITAT⁸: Capital gains on slump sale by Mauritius Company not taxable as per India-Mauritius DTAA

This decision is in connection with the slump sale of the sports broadcasting business (i.e., Ten Sports) by the assessee, a Mauritian subsidiary of Zee Entertainment, to an Indian subsidiary of Sony Pictures.

The facts were that Taj India was appointed by the assessee as its advertising agent to solicit orders for sale of commercial advertising time in India as distributors for licensing Ten Sports channel cable systems in India. Further, Zee Entertainment provided services to the assessee with respect to playout cost by maintaining agreed technical specifications in providing the broadcasting operations and engineering facilities to channels and providing quality support relating to latest broadcast features. The assessee sold the sports broadcasting business (i.e., Ten Sports) to an Indian subsidiary of Sony Pictures.

The decision primarily dwells upon following key aspects viz. (i) whether the assessee has a permanent establishment ('PE') in India, thereby attracting capital gains to tax in India as per Article 13(2) of India-Mauritius Treaty; and (ii) availability of treaty benefit.

(i) Whether assessee has PE in India

Taj India had a right to conclude the contracts on behalf of the assessee; however, it did not habitually exercise that authority, hence not satisfying one of the twin conditions in Article 5 of India-Mauritius DTAA. Therefore, the assessee was held not to be a **dependent agent PE in India**. Further, Zee was providing playout facilities not only for the assessee, but also for many other broadcasters for several years; hence, the playout facility is not at the disposal of assessee. The ITAT remarked that production is separate from playout services availed from Zee and transmission services have been availed from third-party service providers outside India and not at the facility of Zee. Therefore, the assessee was held not to have a **fixed place of PE in India**.

Since the assessee did not have PE in India, the slump sale by the Mauritius company is not covered under Article 13(2) of India-Mauritius DTAA (which provides for taxation of capital gains in India on sale of movable property which forms part of business of PE in

⁸ Taj TV Ltd v DCIT (Mumbai ITAT) ITA No.821/Mum/2021 dated March 31, 2023

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India) and hence, as per Article 13(4), the slump sale of sports broadcasting business by the assessee (i.e., a Mauritian Company) to an Indian subsidiary of Sony Pictures was not taxable in India.

(ii) Availability of Treaty benefit

Merely because a director of the parent company in India was authorized to sign the agreement did not mean that the business is run by the parent of the assessee. Further, the Tribunal noted that the assessee had a valid Tax Residency Certificate and therefore is eligible for availing treaty benefits.

Katalyst comments:

This is an important decision in relation to availing treaty benefit on cross border slump sale. As always, determination of PE is dependent on factual matrix, the documentation and relationship between the parties.

9. CBDT: Notifications/ Circulars issued by CBDT

Following are some key notifications/ circulars issued by the CBDT:

- Physical filing of Form 10F (i.e., Form for claiming treaty benefit) for a non-resident who is not required to obtain PAN in India has been extended from March 31, 2023 to September 30, 2023⁹.
- Consequences of non-linking of PAN and Aadhar extended to July 1, 2023 from April 1, 2023¹⁰.
- New regime is a default tax regime for withholding of tax by employer, unless otherwise informed by employee¹¹.
- For the purpose of computing indexed cost of acquisition in capital gains, CBDT has notified 348 as the cost inflation index for FY2023-24¹².

B. Corporate Law Highlights

1. NFRA¹³: Direction on compliance with Ind AS

NFRA had identified certain instances of 'incorrect' accounting policies adopted by a few companies which reflect inadequate understanding of the measurement and disclosure requirements of the relevant Ind AS. In order to ensure adherence to the Indian Accounting Standards (Ind AS) Reporting Framework NFRA has issued a circular in relation Ind AS 115 and Ind AS 109:

- Appendix A to Ind AS 115 defines the 'transaction price' as the amount of consideration to which an entity expects to be entitled in exchange for transferring promised goods or services to a customer, excluding amounts collected on behalf of third parties. It is

⁹ F. No. DGIT(S)-ADG(S)-3/e-Filing Notification/Forms/2023/13420 DATED March 28, 2023

¹⁰ CBDT Notification No. 15/2023 F. No. 370142/14/2022-TPL dated March 28, 2023

¹¹ Circular 4 / 2023 F. No.370142/06/2023-TPL dated April 5, 2023

¹² CBDT Notification No. 21 / 2023 F.No. 370142/5/2023-TPL dated April 10, 2023

¹³ NFRA Circular NF-25011/1/2023 dated March 29, 2023

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important to note that the transaction price defined in appendix A to Ind AS 115 is different from 'fair value' defined in Ind AS 32. Under Ind AS 115, the application of fair value is relevant only in a limited set of situations.

- Para 46 of 'Ind AS 115 - Revenue from Contracts with Customers' requires that the entity shall recognise as revenue the amount of the transaction price, excluding the estimates of variable consideration that is allocated to that performance obligation. However, it has been noticed by NFRA that the significant accounting policies disclosed by many companies wrongly state that revenue is recognised and measured at fair value of the consideration received or receivable.
- Further, trade receivables are financial assets within the scope of measurement requirements of Ind AS 109 - Financial Instruments. All financial assets are required to be initially measured at fair value +/- the transaction costs. However, those financial assets classified as 'fair value through profit or loss' are required to be measured at fair value. Further, as an exception to these principles, financial assets in the form of trade receivables shall be initially measured at their transaction price, unless those contain a significant financing component determined in accordance with Ind AS 115.
- However, many companies in their accounting policy, either stated separately for trade receivables or stated as part of the accounting policy for financial assets which include trade receivables, are erroneously stating that the trade receivables are initially recognized (or measured) at fair value, which is contrary to the requirements of Ind AS 109.
- Accordingly, all listed companies and other entities falling within the domain of NFRA which are required to follow Ind AS, will need to take cognisance of the above.

2. MCA¹⁴: Amendment in Ind AS

The Ministry of Corporate Affairs (MCA) has notified the Companies (Indian Accounting Standards) Amendment Rules, 2023. Following are the key amendments which will be applicable from financial year beginning on or after April 1, 2023:

- **Ind AS 1, 107 and 34** - Entities to disclose their material accounting policy information instead of their significant accounting policies since the term 'material' is defined in Ind AS and is well understood by stakeholders. Further, guidance has been provided in determining whether accounting policy information is material or not. Immaterial accounting policy information need not be disclosed. If an entity discloses immaterial accounting policy information, such information shall not obscure material accounting policy information.
- **Ind AS 8** - The term 'accounting estimates' has been defined to help entities distinguish changes in accounting estimates from changes in accounting policies. The Rule states that a change in accounting estimate may result from new information or new developments and is not the correction of an error. Further, the effects of a change in an input or in a measurement technique used to develop an accounting estimate are changes in accounting estimates unless they result from the correction of prior period errors.
- **Ind AS 12 and 101** - In connection with deferred tax related to assets and liabilities arising from a single transaction, the scope of the recognition exemption has been narrowed

¹⁴ MCA Notification G.S.R. 242(E), dated March 31, 2023

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down as mentioned in paragraphs 15 and 24 of Ind AS 12 so that it no longer applies to transactions that give rise to equal taxable and deductible temporary differences on initial recognition.

3. MCA¹⁵: Amendment in strike off rules

MCA notifies amendments to the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 with effect from May 1, 2023 which *inter alia* states that an application for striking off u/s 248(2) of the Companies Act, 2013, shall be made to the Registrar, Centre for Processing Accelerated Corporate Exit ('CPACE') in Form No. STK-2. The Ministry further specifies that the Registrar, CPACE established u/s 396(1) of the Companies Act, 2013 shall be the Registrar of Companies for the purposes of exercising functional jurisdiction of processing and disposal of application made in Form No. STK-2 and all matters related thereto under Section 248 of the Companies Act, 2013 having territorial jurisdiction all over India; Further, MCA revises Forms STK-2, STK-7 (Notice of striking off and dissolution), STK-6 and STK-7.

4. NCLAT¹⁶: Scheme rejected if the intent is to circumvent law

The Regional Director in his report stated that the Companies had not adhered to, the utmost provisions of the Companies Act, 2013 primarily on account accepting deposit from shareholder in excess of prescribed limited and non-disclosure of the same in balance sheet, which creates an unfavourable circumstance, to and in favour of the Companies. The Chennai NCLT rejected the scheme of amalgamation stated that if a transaction is entered into mainly with a view to circumvent the law, a Tribunal / Court of Law cannot and will not approve any Compromise / Arrangement.

On appeal to the National Company Law Appellate Tribunal, Chennai (NCLAT), the NCLAT approved the NCLT order rejecting the scheme on the ground that the companies failed to reply to the Show Cause Notices issued by the RoC on the aforesaid matter and had not made out a fit and proper case for sanctioning the Scheme of Amalgamation in accordance with the law. Further, NCLAT stated that disclosure, in respect of any proceedings, pertaining to a Company, which have an impact or material effect on the decision, is required to be made, apart from the disclosure in respect of any 'pending investigation'. Further, the proceedings, ought to be in the character or leading to an investigation, which has a crucial bearing in the subject matter in issue.

5. NCLAT¹⁷: Disclosure of property schedule in Schemes of Amalgamation

One of the properties of the company was not appearing in the company's balance sheet as the sale deed could not be executed due to non-receipt of permission from concerned regulatory authority. In this regard, a Suit for Specific Performance of Contract was pending

¹⁵ MCA Notification No F.No. 1 /28/2013 – CL-V(Part III) dated April 17, 2023

¹⁶ Hotel City Plaza P. Ltd., Trivandrum Apollo Towers P. Ltd., v Union of India NCLAT, Company Appeal (AT) No. 28 of 2021, dated January 16, 2023

¹⁷ Gloster Limited v. Bowreah Jute Mills Private Limited, NCLAT CP (CAA) No. 518/KB/2017, dated February 28, 2023

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before the High Court. The company wrongly disclosed the same to be part of the company's asset in a Scheme of Amalgamation, although the said asset was not appearing in the company's balance sheet.

The NCLT sanctioned the Scheme of Amalgamation. However, the Respondent (not party to the Scheme) sought directions for the order to be recalled and set aside and further sought a direction to the RoC to not give effect to the Scheme, especially the schedule of assets appended thereto. Accordingly, NCLT after approving the Scheme ordered amendment in the Schedule of Assets and imposed a penalty on the company.

The NCLAT dismissed the appeal of the Applicant Company on the following grounds:

- Certain proceedings / suits were pending with regard to claim of title to the property;
- The Appellant did not disclose regarding the pendency of civil disputes as per Section 230(2) of the Companies Act, 201; and
- All the details with regard to the said property ought to have been disclosed in the Scheme of Amalgamation. However, the Applicant Company failed to do so.

6. Bengaluru NCLT¹⁸: Set-off of tax loss in the Scheme of Amalgamation

The transferor company was a wholly owned subsidiary of the listed company. Pursuant to merger of transferor company with the transferee company, the tax loss of the transferor company was intended to be set off against the profits of the transferee company subject to compliance of conditions as per Section 72A of the Act.

The NCLT held that there is no bar in setting off the tax loss of transferor companies against the profits of the transferee company, especially when there are sufficient safeguards in the form of conditions to be complied with by the transferor and the transferee companies under Section 72A of the Income-tax Act, 1961. The tax authorities, during the course of assessment, can ascertain whether the aforesaid conditions are complied with.

7. NCLAT¹⁹: Partnership firm being an operational creditor can file CIRP application

A partnership firm had filed a CIRP application with NCLT against the corporate debtor. NCLT order rejected application under section 9 of the Insolvency and Bankruptcy Code, 2016 having on the premise that the application was barred by Sec. 69(2) of the Partnership Act, 1932. On appeal to NCLAT, NCLAT stated that a **suit** initiated by unregistered partnership firm is barred as per Section 69(2) of the Indian Partnership Act, 1932. However, CIRP application under Section 9 of the Insolvency and Bankruptcy Code, 2016 is not considered to be a suit, and hence, the limitation to unregistered partnership Section 69(2) of the Partnership Act, 1932 which is in connection with the suit cannot be extended to CIRP application under Insolvency and Bankruptcy Code, 2016.

¹⁸ Yuflow Engineering Private Limited and Yuken India Limited, CP (CAA) No. 27/BB/2022 dated February 28, 2023

¹⁹ Rourkela Steel Syndicate vs. Metistech Fabricators Pvt. Ltd NCLAT LSI-263-NCLAT-2023(NDEL)

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C. Securities' Law highlights

1. Decisions taken at Board Meeting of SEBI

In the SEBI Board meeting held on March 29, 2023, SEBI has taken certain key decisions which, inter-alia, include:

Corporate governance and Disclosures

- Introduction of quantitative threshold for determining 'materiality' of events / information under Regulation 30 of LODR. Stricter timeline for disclosure of material events / information for which decision has been taken in the meeting of the board of directors (within 30 minutes) and which are emanating from within the listed entity (within 12 hours). Further, market rumours to be verified and confirmed, denied, or clarified, by top 100 listed companies w.e.f. October 1, 2023 and top 250 listed companies w.e.f. April 1, 2024.
- In relation to special rights given to shareholders, periodic approval from shareholders is required to address the issue of perpetuity of shareholders right.
- Mechanism of disposal of undertaking outside a Scheme Framework being strengthened.
- Periodic shareholders' approval shall be required for any director on the Board of a listed company so as to do away with the practice of permanent board seat. Further, listed companies to fill vacancy of Directors, Compliance Officer, CEO & CFO within 3-months from the date of such vacancy.
- Streamlining the timeline for submission of first financial result by newly listed company.
- Compliance period extended from contiguous block of 2 years to 3 years for Large Corporates to meet their financing needs through issue of debt securities to the extent of 25% of their incremental borrowings. (The aforesaid amendment has since already been carried out by SEBI vide Circular No SEBI/HO/DDHS/DDHS-RACPOD1/P/CIR/2023/049 dated March 31, 2023). Further, 'comply or explain' period for High Value Debt Listed Entities in respect of corporate governance norms have been extended till March 31, 2024.

Investor Protection

- Decision to operationalise Online Dispute Resolution Mechanism for investors by extending the Market Infrastructure Institutions (MII) administered conciliation and arbitration mechanism to registered intermediaries / regulated entities and their investors / clients.

Environmental, Social, And Governance (ESG)

- Introduction of 'BRSR Core' which shall contain key performance indicators (KPIs) relating to ESG for which listed companies shall obtain reasonable assurance. A glide path approach has been considered for implementation of such measure. Initially, these provisions shall apply to top 150 listed companies from FY-2023–24, which shall gradually extend to top 1000 listed companies by FY-2026-27.
- ESG mutual fund schemes shall invest at least 65% of AUM in listed companies where assurance on BRSR Core is undertaken. Enhanced disclosures on voting decisions of

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mutual funds with specific focus on ESG. Further, there shall be regulatory framework for ESG rating providers.

AIFs/AMCs

- Amendment to AIF Regulations to prescribe provisions for valuation of investments, dematerialisation of units, certification requirement for key employees of Investment Manager, transactions with associates, and option to sell unliquidated investments to a new scheme of Alternative Investment Fund.
- Bringing clarity on the roles and responsibilities of Trustees and Board of Asset Management Companies of Mutual Funds with a focus on unitholder protection and review of Regulatory Framework for Sponsors of Mutual Funds to give greater flexibility to the industry.

2. SEBI²⁰: Guidelines with respect to excusing or excluding an investor from an investment of AIF

An AIF may excuse its investor from participating in a particular investment in the following circumstances:

- Based on the opinion of legal professional/advisor, participating in the investment would be in violation of law.
- If investor disclose to the manager that participation of investor in the investment opportunity would be in contravention to the internal policy of the investor, manager shall ensure that terms of such agreement with the investor include reporting of any change in the disclosed internal policy, to the AIF, within 15 days of such change.

AIF may exclude an investor from participating in a particular investment opportunity, if the manager is satisfied that the same may lead to violation of applicable law.

If investor is AIF or other investment vehicle, such investor may be partially excused/excluded from the investment opportunity to the extent of contribution of said investment vehicle who are to be excused/excluded from investment opportunity.

3. SEBI²¹: Direct plan for Scheme of AIF and trail model for distribution commission in AIFs

To provide flexibility to investors for investing in AIFs and bring transparency in expenses and curb mis-selling, following change is specified w.e.f. May 1, 2023:

- AIF Scheme shall have an option of 'Direct Plan' for investors without any distribution fee/placement fee. Further, AIFs shall ensure that investors who approach the AIF through a SEBI registered intermediary which is separately charging the investor any fee are on-boarded via Direct Plan only.
- AIFs shall disclose distribution fee/placement fee, if any, to the investors of at the time of on-boarding.

²⁰ Circular No. SEBI/HO/AFD-1/PoD/P/CIR/2023/053 dated April 10, 2023

²¹ Circular No. SEBI/HO/AFD/PoD/CIR/2023/054 dated April 10, 2023

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- In case of Category III AIFs, no upfront distribution fee/ placement fee shall be charged by directly or indirectly to their investors. Further, any distribution fee/ placement fee paid shall be only from the management fee received by the managers of such Category III AIFs.
- Category I and II AIFs may pay upto 1/3rd of the total distribution fee/ placement fee to the distributors on upfront basis, and the remaining distribution fee/ placement fee shall be paid to the distributors on equal trail basis over the tenure of the fund.

D. Other Regulatory Highlights

1. Competition (Amendment) Bill, 2023

The Competition (Amendment) Bill, 2023, has been passed by both the houses of the Parliament; the key highlights are as follows:

- M&A transaction having value of more than Rs 2,000 crore will require CCI's approval.
- The scope of the definition of 'relevant product market' and 'relevant geographical market' has been enhanced.
- Provides a framework for settlement and commitment for faster resolution of investigations.
- Proposal to decriminalise certain offenses under the Act.
- Definition of the term "party" proposed to be added to include various person such as consumer, enterprise, information provider, consumer/trade association, government / statutory authority. Further, the term party shall also include an enterprise or a person against whom any inquiry or proceeding is instituted.
- Modifies the definition of 'control' as the ability to exercise material influence over management, affairs, or strategic commercial decisions.
- Expands the powers of the Director General for investigating contraventions under the Act.
- Bill mandates depositing 25% of any amount levied by CCI prior to filing an appeal against a CCI order.
- Bill allows the use of intellectual property rights as a defence in cases of anti-competitive agreements.
- Intimation about combinations shall be made before consummation of the combination rather than earlier prescribed timeline of 30 days.
- Bill reduces the time limit for approval of combinations from 210 days to 150 days.
- Enterprises or persons not engaged in identical or similar businesses shall be presumed to be part of the anti-competitive agreements if they actively participate in the furtherance of such agreements.
- The bill proposes to impose penalties on entities based on their global turnover instead of the current practice of considering only relevant market turnover.
- Recovery of legal costs along with penalties by Commission should also be credited to Consolidated Fund of India.
- Submission of information after 3 years cannot lead to the initiation of Inquiry into certain agreements and dominant position.

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Katalyst comments:

The aforesaid amendment seeks to plug certain loopholes and enhance the ease of doing business by providing regulatory certainty for achieving fair play and competition in markets.

2. RBI: Introduction of web-based portal called PRAVAAH

RBI is set to introduce a new secured web-based portal called “PRAVAAH” (Platform for Regulatory Application, Validation And AuthOrisation) aimed at simplifying and streamlining the application processes. The key features of this portal are as under:

- Provide transparent timelines for the decision-making process on the applications/approvals sought by the applicants.
- Offer a single interface for applicants to submit and track the status of their applications, making it easier to monitor the application’s progress.
- Standardize the application forms, making the application process more uniform and simpler.

3. RBI²²: Framework for acceptance of Green Deposit

RBI has unveiled a Framework for acceptance of Green Deposits, to be effective from June 1, 2023. “Green deposit” is defined as an interest-bearing deposit, received by Regulated Entities (REs) (which includes Scheduled Commercial Bank [excluding Regional Rural Banks, Local Area Banks and Payments Banks], deposit taking NBFC including Housing Finance Corporations) for a fixed period and the proceeds of which are earmarked for being allocated towards green finance, i.e., for lending to and/or investing in the activities/projects for climate risk mitigation, adoption and resilience. The rationale behind the framework is to encourage REs to offer green deposits to customers, protect interest of the depositors, aid customers to achieve their sustainability agenda, address greenwashing concerns and help augment the flow of credit to green activities/projects.

The aforesaid framework shall be applicable to - (a) Scheduled Commercial Banks including Small Finance Banks (excluding Regional Rural Banks, Local Area Banks and Payments Banks) and (b) all deposit taking NBFCs registered with the RBI, including HFCs. RBI lists down 9 sectors of green projects towards which the proceeds shall be allocated.

4. Foreign Trade Policy, 2023

The Foreign Trade Policy (‘FTP’) 2023 has been announced which will replace the existing FTP 2015-2020 (which extended until March 31, 2023 due to the Covid pandemic and volatile geo-political scenario). The new FTP is intended to provide the vision to take India’s goods and services exports to \$1 trillion by 2030 by shifting from incentive to remission and entertainment-based regime. The new FTP is a perennial policy with no sunset clause.

Key highlights of the new FTP are as under:

1) E-commerce exports

- FTP benefits to be extended to E-commerce exports.

²² RBI Notification No RBI/2023-24/14 DOR.SFG.REC.10/30.01.021/2023-24 dated April 11,2023

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- IT enablement in department of Commerce, Post, CBIC to be undertaken in 6 months and training activities for small e-commerce operators.
- Dak Ghar Niryat Kendras shall be operationalised throughout the country to work in a hub-and-spoke model with Foreign Post Offices (FPOs) to facilitate cross-border e-Commerce and to enable artisans, weavers, craftsmen, MSMEs in the hinterland and land-locked regions to reach international markets.
- E-commerce export hubs with warehousing facility to be notified to help e-commerce aggregators for easy stocking, customs clearance and returns processing.

2) Streamlining of SCOMET licensing procedure

- Focus of FTP 2023 on Special chemicals, Organisms, Materials, Equipment and Technologies (SCOMET).
- SCOMET policy emphasizes India's export control in line with its international commitments under various export control regimes to control trade in sensitive and dual use items including software and technology.
- Policy simplification for export of dual use high end goods/technology such as UAV/Drones, Cryogenic Tanks, etc.

3) Steps to boost manufacturing

- Prime Minister Mega Integrated Textile Region and Apparel Parks (PM MITRA) scheme added for export benefits under Common Service Provider (CSP) and Export Promotion Capital Goods Scheme (EPCG).
- Dairy sector to be exempted from maintaining Average Export Obligation.
- Battery Electric Vehicle (BEV) of all types, Vertical Farming equipment, Rainwater Filters, and Green Hydrogen are added to the Green Technology and will now be eligible for reduced Export Obligation requirement.
- Benefits of Self-Ratification Scheme for fixation of Input-Output Norms extended to 2 star and above status holders in addition to Authorized Economic Operators at present.
- Special AA scheme extended to apparel and clothing sector under para 4.07 of Handbook of procedures ('HBP') on self-declaration basis.

4) Districts as Export Hubs

- Removal of infrastructure and logistics bottlenecks in Districts to provide an export-oriented ecosystem.
- Decentralizing export promotion to District level and capacity building at District level.

5) Ease of doing business, reduction in transaction cost and e-initiatives

- Online approvals within a day for issuance of Advance Authorization ('AA') and Export Promotion for Capital Goods ('EPCG') revalidation of authorizations and extension of Export Obligation ('EO') period.
- Significant reduction of user charges for MSMEs under Advance Authorization and EPCG.

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- Paperless filing of EO and discharge applications.

6) Export promotion initiatives

- Status holder status rationalized to enable more exporters into higher status bracket.
- Allowing Merchanting trade reforms under FTP subject to compliance with RBI guidelines, except for goods/ items in the CITES and SCOMET list.
- Faridabad (Apparel), Moradabad (Handicrafts), Mirzapur (Handmade carpet and Dari) and Varanasi (Handloom and Handicraft) newly declared as Town of Export Excellence ('TEE') to the existing 39 TEEs.
- For the purpose of export benefits, Rupee payments to be accepted.

7) Special One-time Amnesty Scheme for Export Turnover Default

- Amnesty scheme for one-time settlement of default in export obligation by Advance Authorization and EPCG authorization holders being introduced.
- All pending cases of default in Export Obligation (EO) of authorizations mentioned can be regularized by the authorization holder on payment of all customs duties exempted in proportion to unfulfilled Export Obligation and maximum interest is capped at 100% of such duties exempted.
- Amnesty scheme will be available till September 30, 2023.

E. Goods and Service Tax Highlights

1. GST payable by a Co-operative housing society on gratuitous amount received from an outgoing member in spite of no service provided by the society²³

The Maharashtra Appellate Authority for Advance Ruling ('MAAAR') has upheld the decision of Maharashtra Authority for Advance Ruling ('MAAR') and held that the contribution by the outgoing member is nothing but advance amounts paid to the society for services rendered/ to be rendered for the members of society and is liable to GST.

Katalyst comments:

The contribution made by outgoing member is not in relation to any service provided by the society and hence, no GST should be payable on the same. In this context, the advance ruling is unfavorable and will likely get into higher forum.

2. No service tax is applicable on Corporate Guarantee²⁴

The Supreme Court, in the matter of applicability of service tax on corporate guarantee, has held that issuance of corporate guarantee on behalf of a subsidiary company without consideration would not fall within the definition term 'banking and other financial service' and thus, cannot be a taxable service. Accordingly, the Supreme Court dismissed the appeal filed by the Revenue against the order of the Mumbai Tribunal.

²³ M/S Monalisa Cooperative Housing Society Ltd – [2023-TIOL-08-AAAR-GST] dated March 23, 2023

²⁴ CCGST & CE v Edelweiss Financial Services Ltd [CESTAT] – [2023-TIOL-26-SC-ST] dated March 17, 2023

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Katalyst comments:

The decision of the Supreme court is in relation to applicability of service tax; however, under the GST regime, Sr no. 2 of Schedule I of the CGST Act provides that supply between related persons is taxable even in absence of consideration and therefore, this particular judgement should be observed from service tax perspective only.

3. Charges inextricably linked to construction taxable as bundled-service; other charges are taxable at normal rate of 18%²⁵

Maharashtra Appellate Authority for Advance Ruling ('MAAAR') has held that 'Charges' such as water connection charges, electric meter installation and deposit for meter, development charges, legal fees are inextricably linked to construction of residential apartment and hence, part of a bundled service with principal service being of construction service and taxable at 12%. Additionally, certain other charges like advance maintenance, club house maintenance, infrastructure charges, share money application and entrance fee of the organization are not expected by every customer and are not inextricably linked to the construction services in respect of residential projects and hence, such charges are taxable at 18%.

Katalyst comments:

The Appellate Authority for Advance Ruling has partly set aside the ruling by Authority for Advance Ruling which provided that GST on all charges relating to construction service is payable at 18%. The Appellate Authority for Advance Ruling has bifurcated 'charges' based on its inextricable linkage with construction services; the charges inextricably related to construction services are bundled with the core service and GST rate of 12% is applied on the same.

4. GST applicable on liquidated damages received for non-performance²⁶

Andhra Pradesh AAR has held that payment of liquidated damages by defaulting party to the non-defaulting party for tolerating the act of non-performance or breach of contract is a consideration for tolerating of an act or a situation under an agreement and hence, such an 'activity' constitutes supply of service and the liquidated damages are liable to 18% GST. The AAR also held that payment towards damages is incidental to the main supply and if the main supply is taxable, liquidated damages are taxable and if the principal supply is exempt, then the incidental liquidated damages are exempt.

Katalyst comments:

The AAR has not taken into consideration the Circular No. 178/10/2022 dated August 03, 2022 which provides that the liquidated damages paid in lieu of breach of contract are not consideration for tolerating breach / non-performance. Thus, AAR has interpreted the circular differently by stating that the captioned circular is not universal and absolute but only meant to clarify the position of the law and the circular shall be applied reasonably having regards to the facts of the case.

²⁵ Puranik Builders Ltd. [TS-116-AAAR(MAH)-2023-GST] dated March 20, 2023

²⁶ AP Power Development Co. Ltd. [TS-117-AAR(AP)-2023-GST] dated March 31, 2023

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