KATALYST
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Katalyst Kaleidoscope

August 2020: Tax and Regulatory Insights

A. Income-tax Highlights

1. Mumbai Tribunal restricts the aggregate depreciation on assets acquired under slump sale to their respective tax WDV in the hands of transferor[1]

The assessee had entered into a Business Transfer Agreement ('BTA') for purchase of a business undertaking by way of slump sale. The assessee undertook purchase price allocation and recorded such assets at their fair market value basis valuation report; and considered such fair value of assets as the cost of acquisition for the purpose of depreciation claim for income-tax purposes.

The Assessing Officer ('AO') held that acquisition by way of slump sale falls within the ambit of succession u/s 170(1) of the Income-tax Act, 1961 ('ITA') and disallowed the depreciation claim based on the fair value the assets acquired by invoking the fifth proviso (now 6th proviso) to section 32(1) [6th proviso to section 32(1) limits the aggregate depreciation on an asset in cases of succession / merger / demerger etc. to the amount as if no succession / merger / demerger took place].

The Tribunal confirmed the above disallowance of depreciation claim basis fair market value of the assets by holding that succession provisions covered u/s 170 of the ITA is applicable to transfer of assets and since in this case the assessee had acquired the assets as a part of business undertaking by way of slump sale, the succession provisions u/s 170 are applicable in this case. Tribunal opined that on the principle of the Noscitur a sociis, the asset transferred under slump sale would fall under the sweep of 6th proviso to Section 32(1), despite the word slump sale not being specifically used therein. As the accompanying word is sufficient for the inclusion thereof on this principle by the amalgamation, succession and demerger in their cognate sense; accordingly, Tribunal held that the depreciation on assets transferred under slump sale had to be considered from the prescription of this proviso, even without invoking the provision of section 170(1).

However, the Tribunal upheld the alternative claim of the assessee that the difference between the fair value of such assets and the tax WDV in the hands of Seller would qualify as goodwill and consequentially, eligible for tax deprecation.

Katalyst comments: *This decision will impact buyers who have acquired or propose to acquire depreciable assets on a slump sale basis and thereby should logically be entitled to claim depreciation based on the fair value of the assets acquired on slump sale; Kindly note the Tribunal did allow the alternative claim of the Purchaser that the difference between the fair*

[1] Archroma India Pvt. Ltd (ITA Nos. 306/Mum/2019 and 6919/Mum/2018 and C.O. No. 07/Mum/2020)

value of such assets recorded in the books of Purchaser and the tax WDV in the hands of Seller would qualify as goodwill which could, on facts, could entitle higher tax depreacition.

2. **Mumbai Tribunal holds that consideration for transfer of development rights taxable as business income[2]**

The assessee, a civil contractor, had transferred certain development rights in a land parcel to a builder, and as per the terms of the Agreement, the assessee had handed over the development rights for a consideration and received part payment against the same.

The assessee offered net sale consideration (after deducting relatable expense) for tax as business income. However, the AO held that since the assessee parted with development rights and possession of land was also given to the developer, the same fell within the definition of 'transfer' within the scope of section 2(47) of the IT Act and taxed the entire sale consideration upfront in the year of transfer.

The Tribunal observed that since the assessee had considered its income as business income, therefore, the provisions of transfer as specified under section 2(47)(v) of the IT Act would not be applicable as the same is applicable only in case of a capital asset held by an assessee and not business assets.

Further, in view of fact that in terms of agreement only part income accrued to assessee and since the balance consideration was a conditional receipt which would accrue only in subsequent years in event of assessee performing certain contractual obligations, entire amount of sale consideration could not be brought to tax in assessment year in question.

Katalyst Comments: *While companies engaged into construction business usually hold their development rights as business assets, this ruling gives respite to them on the issue of characterization of the rights as business asset and consequential treatment.*

3. **Delhi Tribunal rejects recharacterization of capital reserve arising out of amalgamation as revaluation reserve to be added back to book profits for MAT computation[3]**

In the given case, pursuant to scheme of amalgamation, five companies (related to the assessee) amalgamated with the assessee. All assets and liabilities (including shares of Indiabulls Housing Finance Ltd held by amalgamating companies) were transferred to the assessee upon merger with effect from the appointed date; Aforesaid Indiabulls shares were

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[2] *ITO* v. *Abdul Kayum AhmedMohd. Tamboli* [2020] 117.taxmann.com 637 (Mumbai - Trib)

[3] Hespera Realty Pvt. Ltd v. DCIT (ITA No. 764/Del/2020)

recorded at their fair values in the books of assessee by following 'purchase method' of accounting for merger recordal under AS-14. Further, the difference between the fair value of assets and liabilities taken over upon merger by the amalgamated company, was recorded as capital reserve by the amalgamated company.

Subsequent to merger, the assessee sold part of aforesaid Indiabulls shares (received upon merger) on a recognised stock exchange and claimed the long-term capital gains tax exemption under erstwhile section 10(38) of the ITA. In the books of account, since the shares were transferred at their fair value, the resultant gain was credited as part of 'Other Income – profit on sale of equity shares' which was considered in the book profits under MAT.

The AO disregarded the treatment adopted upon merger by assessee in the books of accounts and considered the difference arising on account of revaluation as revaluation reserve instead of capital reserve on the ground that merger was carried out with the intent of evading tax on book profit.

On appeal, the Delhi Tribunal rejected the AO's re-characterization by holding that revaluation reserve is created when an entity revalues its own assets, already acquired and recorded in its books at certain values while in the instant case, the assessee had not revalued its existing asset but only recorded fair values of assets and liabilities acquired pursuant to Scheme as its cost of acquisition.

Katalyst comments:

- *Under the IND-AS regime, common control business combinations require that assets and liabilities taken over upon merger are recorded at their respective book-values (as reflected in the books of amalgamating companies). Additionally, MAT provisions do not apply to company which has opted for lower corporate tax rate of 25.17% u/s 115BAA of the ITA. Accordingly, this ruling may have a bearing on non-common control business combinations or companies which are not under IND-AS regime; and fall under old tax regime (i.e. determining book profits for MAT purposes).*
- *Further, the accounting standards have prescribed the treatment to be adopted in books of accounts to classify the difference arising between fair value of assets and liabilities taken over. However, the tendency of the tax department to recharacterize the said treatment is unjustified.*

4. Mumbai Tribunal confirms the addition as undisclosed income in the hands of sole beneficiary of an Offshore Family Trust for the funds held in Swiss Bank account of Cayman Islands based underlying company of such Family Trust[4]

The assessment of Mrs. Renu Tharani ('the assessee') for AY 2005-06 was re-opened by the income-tax department basis the 'base note' received by investigating wing as a part of Swiss Leaks which revealed that the assessee was the sole 'discretionary' beneficiary of a 'Tharani Family Trust' (which had an underlying company based in Cayman Islands and which operated the HSBC Geneva bank account). The AO added an income of INR 196 Crs as undisclosed income under section 69 of the ITA, which was the peak balance held in the HSBC Bank account and as income which had escaped assessment.

The assessee, during the course of re-assessment proceedings, raised several objections as under:

- She was a non-resident under section 6(1) of the ITA and thus any income outside India was not liable to be taxed as per provisions of section 9(1) of the ITA.
- She had not maintained any bank account with HSBC Bank, Geneva and also is not the owner of the said bank account.
- Instead, the account was maintained by GWU Investments Limited (a Cayman Island based company and an underlying company of Tharani Family Trust for which the assessee was the beneficial owner).
- Letter from HSBC Bank confirming the fact that no payment was made to her either as a beneficiary or as a beneficial owner by GWU Investments Limited.

However, the Mumbai Tribunal confirmed the addition by holding that the reopening of the assessment and the addition to the total income are valid on the following observations-

- The assessee had not disclosed Swiss account details in her return of income.
- The Tribunal observed that within a short time of information about the bank account coming into the possession of the AO, (i) the account was closed, (ii) the underlying company was closed as its name was struck off from Registrar of Companies, Cayman Islands (iii) whatever assets were held in this bank account were transferred back to GMW Investments Ltd (company in Cayman Islands- a tax haven where it is almost impossible to find out about beneficial owners of a corporate entity; and (iv) the Tharani Family Trust stood terminated.
- Further, the Tribunal noted that in response to specific request from AO, the assessee had declined to sign 'consent waiver' (i.e. enforcing privacy under the Swiss secrecy and data

[4] *Renu T Tharani* v. *DCIT* [2020] 117 taxmann.com 804 (Mumbai - Trib.)

protection laws) and the effect of not signing was depriving the AO to seek relevant information from the bank in respect of assessee's account.

- Referring to the information received and the inability to furnish a Trust Deed or relevant documents, the Tribunal asserted that the assessee is a beneficiary and a beneficial owner of GMU Investments Ltd, a Cayman Islands entity.

5. Madras HC confirms capital gain exemption on land transferred to holding company by 99.99% subsidiary with nominee shareholders[5]

In this case, the Madras High Court was dealing with a situation of public company wherein 99.99% shareholding was held by the holding company and 0.01% was held between 6 individuals who were nominee shareholders. (Under Companies Act, 2013 a public company needs seven shareholders). Basis these facts, the High Court rightly held that capital gain exemption under section 47(v) of the ITA should be allowed in the context of transfer of land by 99.99% subsidiary having nominee shareholders to holding company.

6. SC holds Project Office not carrying out core business would not constitute a Permanent Establishment in India[6]

The assessee, a Korean Company, was awarded a turnkey project in India for which it had set up a Project Office ('PO') which served as a co-ordination and a communication channel. The issue raised in this case was whether such PO was a mere liaison office or was involved in the core activity of execution of the project itself as a Permanent Establishment ('PE') of the assessee in India under Article 5(1) of India-Korea DTAA.

After a detailed examination of all the documents, the Supreme Court ('SC') held that the PO carried out activities that were preparatory and auxiliary in nature and did not constitute a fixed place PE of the assessee in India. The key observations are as follows:

- The condition precedent for applicability of Article 5(1) of the DTAA and ascertainment of a PE is that it should be an establishment through which the business of an enterprise is wholly or partly carried out. Profits of the foreign enterprise are taxable only where the said enterprise carries on its core business through a PE;
- The PO of the assessee was established to execute delivery documents in connection with the contract and the fact that no expenditure relating to the turnkey project was incurred would elucidate that non-core functions were only carried out;

[5] *CIT* v. *M/s. Shardlow India Ltd* [Tax Case Appeal No. 485 of 2018 (HC)]
[6] *Director of Income-tax* v. *Samsung Heavy Industries Co. Ltd* [2020] 117 taxmann.com 870 (SC)

- Further, since only two people were working in the PO, neither of whom were qualified to perform any core activity, it was held that the PO was merely an auxiliary office to act as a liaison between assessee and ONGC.

Katalyst comments: *This judgement of the SC is a respite to foreign assessee's setting up a project office for undertaking only preparatory and auxiliary activities and thereby granting benefit under the respective tax treaty. This principle laid down by the SC should also help in the Multi-lateral Instrument regime.*

7. Memorandum of Understanding ('MoU') signed by CBDT with MSME[7] and CBIC[8] respectively

- A MoU is signed between CBDT and the Ministry of Micro, Small and Medium Enterprises, Government of India ('MSME') which will facilitate seamless sharing of certain Income-tax Return related information by Income-tax Department to MSME.

- Further, CBDT has also entered in a MOU with the Central Board of Indirect Taxes and Customs ('CBIC') which will facilitate sharing of data and information on an automatic and regular basis. In addition to regular exchange of data, CBDT and CBIC will also exchange (on request and spontaneous basis) any information available in their respective databases which may have utility for the other organisation.

Katalyst comments: *Whilst it is, in principle, a good initiative, one only hopes that this will be used selectively and more for understanding and reconciling where needed.*

8. PAN exemption for Non-residents investing in IFSC based Cat-I and Cat-II AIFs

CBDT has inserted Rule 114AAB, notified vide the Income-tax (19th Amendment) Rules 2020 to exempt all non-residents (including foreign companies) who have, during a previous year, made investment in an alternative investment fund (AIF) located in IFSC and is registered as a Category I AIF or Category II AIF, from the mandatory requirement of obtaining PAN from the income tax authorities, if the following conditions are met:

- Non-Resident does not earn any income in India, other than the income from investment in IFSC based Category I AIFs or Category II AIFs, during the previous year;

- Any income tax due on income of Non-Resident has been deducted at source and remitted to the Central Government by such IFSC based Category I AIF or Category II AIF, in accordance with section 194LBB of the ITA; and

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[7] CBDT Press Release dated July 20, 2020
[8] CBDT Press Release dated July 21, 2020

- Non-Resident furnishes the requisite details and documents (such as contact details and address of the Non-Resident, declaration of residence of such Non-Resident outside India, and the tax identification number or unique identification number allocated to such Non-Resident in its country of residence) to such IFSC Category I AIF or Category II AIFs.

IFSC based Category I AIFs and Category II AIFs would be required to furnish a quarterly statement (in Form 49BA) capturing the aforementioned information received by it from Non-Resident investors, within 15 days from the end of the quarter.

Additionally, the provisions of section 206AA (which provides for higher rate of withholding in the absence of PAN) would also not apply to payments made to a Non-Resident, pursuant to the exemption granted to it under Rule 114AAB.

9. CBDT directs all orders to be passed through the National E-Assessment Centre under the Faceless Assessment Scheme[9]

- The CBDT, *vide*, its order dated August 13, 2020, has directed that all the assessment orders shall hereafter be passed by the National e-assessment Centre through the Faceless Assessment Scheme, 2019.

- Further, the following cases will be an exemption to the above Scheme:
  i. Assessment Orders in cases assigned to Central Charges; or
  ii. Assessment Orders in cases assigned to International Tax Charges

- This shall come in to force with effect from August 13, 2020

Katalyst Comment*: On the footing of "minimum government – maximum governance", the CBDT has devised the Taxpayers' Charter. While this is a paradigm shift from the customary assessment process involving a human interface, the on-ground situation still appears to be a challenge; as an example, large corporate assessments (especially those with sectoral issues - say, banks, insurance companies or shipping companies) will be a huge challenge for the companies as well as the tax department.*

[9] CBDT Order F.No. 187/3/2020-ITA-I dated August 13, 2020

B. RBI and Foreign Exchange Regulations Highlights

1. Revised Guidelines for Core Investment Companies ('CICs')[10]

The Working Group (WG) to review the regulatory and supervisory framework for CICs was constituted under the chairmanship of Tapan Ray, former secretary MCA, and the report of the WG, was put in the public domain in November 2018. Based on the recommendations of the WG and inputs received from stakeholders, the CIC guidelines have been revised and here are some key highlights:

- CICs with an asset size of less than INR 100 Crs (irrespective of whether or not accessing public funds), and also CICs with an asset size of INR 100 Crs and above (if not accessing public funds) are not required to register with the RBI.

- Number of layers of CIC within a group shall be restricted to 2 (including the parent CIC), irrespective of the extent of direct or indirect holding/ control exercised by a CIC in the other CIC. If a CIC makes any direct/ indirect equity investment in another CIC, it will be deemed as a layer for the investing CIC. Existing entities shall reorganise their business structure and adhere to this guideline latest by March 31, 2023.

- Definition of adjusted net worth has been tweaked to exclude any direct or indirect capital contribution by one CIC to another CIC in excess over 10% of the net owned funds of the investing CIC. The deduction requirement shall take immediate effect for any investment made by a CIC in another CIC. However, in cases where the investment by a CIC in another CIC is already in excess of 10%, the CIC need not deduct the excess investment from owned funds for computation of its adjusted net worth till March 31, 2023.

- Risk management framework and corporate governance and disclosure requirements prescribed for CICs - Directs the parent CIC in the group or the CIC with the largest asset size to constitute a Group Risk Management Committee comprising of minimum of 5 members, including executive members which shall report to CIC's Board that constitutes it and meet at least once in a quarter.

- All CICs with asset size of more than INR 5,000 Crs shall appoint a Chief Risk Officer with clearly specified roles and responsibilities.

[10] RBI Notification – DoR (NBFC) (PD) CC.NO. 117/03.10.001/2020-21 dated August 13, 2020

- CICs are allowed to invest in money market instruments, including mutual funds which make investments in money market instruments/debt instruments with a maturity of up to 1 year.

- A systematically important CIC will be termed as a CIC; however, a CIC not required to register will henceforth be termed as "Unregistered CIC" instead of "Exempted CIC".

2. **Administrative powers given to the Reserve Bank of India ('RBI') for ease of doing business under Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ('NDI Rules')[11]**

The Central Government, *vide*, its notification dated July 27, 2020 has amended the NDI Rules to provide as under:

- New Rule 2(A) inserted in the NDI Rules to empower RBI to (i) administer NDI Rules and (ii) interpret and issue directions, circulars, instructions and clarifications it deems fit, for effective implementation of NDI Rules.

- However, wherever Government approval is prescribed in NDI Rules, such approval will still be required to be sought and RBI will not have jurisdiction to grant such approvals.

Katalyst Comments: *By giving more administrative powers to RBI, the new Rules reduces the overall transaction approval process and makes the transaction faster and easier, it is important that RBI does exercise these powers in the interest of ease of doing business.*

3. **RBI announces a Resolution Framework for Covid-19 related financial stress**

The ongoing pandemic has led to significant financial stress for borrowers which can potentially impact the long-term viability of many firms, otherwise having a good track record under the existing promoters, due to their debt burden becoming disproportionate relatively to their cash flow generation abilities. Such wide spread impact could impair the entire recovery process, posing significant financial stability risks.

Considering the same, the RBI, with an intent to facilitate revival of real sector activities and mitigate the impact on the ultimate borrowers, has decided to provide a window under the Prudential Framework[12] to enable the lenders to implement a resolution plan in respect of

[11] Dept of Economic Affairs Notification No. S.O. 2442(E) dated July 27, 2020
[12] The Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019, dated June 7, 2019

eligible corporate exposures without change in ownership and personal loans, while classifying such exposures as "Standard Asset", subject to specified conditions therein.

The key features of the Resolution Framework are as under:

- Accounts which were in default for not more than 30 days as of March 1, 2020 will be eligible for such restructuring. Such accounts will continue to retain standard asset classification after implementation of the plan. All other stressed accounts will have to follow Prudential Framework for resolution.

- An Expert Committee to be set up to make recommendations to the RBI on the required financial parameters, along with sector specific benchmarks to be factored into each resolution plans.

- One-time restructuring plan may be invoked any time before December 31, 2020 and must be implemented within 180 days of invocation.

- A clear monitoring period is prescribed for accounts which are restructured under this scheme which begins from the date of implementation till the point in time the borrower pays back atleast 10% of residual debt.

- Banks will also be required to disclose the quantum of loans which were classified as standard after the restructuring plan, but later slipped to NPA during the monitoring period on a half yearly basis starting September 30, 2021.

Katalyst comments: *Such restructuring facilities will provide a major respite to corporate and retail borrowers. Key sectors, such as MSMEs, hospitality, aviation, retail, real estate and auto, which are facing liquidity crunch, will benefit from the move. However, such restructuring will delay the NPA recognition by Banks and Financial Institutions thereby impacting the overall balancing act of the economy.*

C. Securities and Exchange Board of India ("SEBI")

1. SEBI issues exit option guidelines for Real Estate Investment Trusts ('REIT')[13] and Infrastructure Investment Trusts ('InvIT')[14] dissenting unit holders

In two separate Circular dated July 17, 2020, SEBI has provided detailed guidelines with respect to conditions, manner and mechanism of exit option to be provided to dissenting unit holders pursuant to Regulation 22(6A) and 22(8) of SEBI (REIT) Regulations, 2014 and Regulation 22(5C) and 22(7) of SEBI (InvIT) Regulations, 2014 respectively.

The Circular provides that an acquirer, providing exit option to dissenting unit holders, shall appoint one or more merchant banker, registered with the Board, as Lead manager for the exit option or offer who shall ensure compliance with SEBI regulations and particular circulars prescribing the exit mechanism. Thereafter, the Lead manager shall send Letter of Offer to all dissenting unit holders and file the same along with due diligence certificate in format specified with the exchanges. Upon completion of exit option process, the due diligence certificate shall be filed by Lead manager with SEBI within 2 working days of payment consideration by the acquirer.

Katalyst comments: *This is a welcome move of doing away with the perpetual lock-in requirement for sponsors of REITs and InvITs. These guidelines provide a framework to dissenting unitholders and a legislated mechanism for their exit.*

2. SEBI has directed the depositories to put in place a system for recording all types of Encumbrances in Depository System[15]

- The SAST (Substantial Acquisition of Shares and Takeover) Regulations, 2011 requires promoters of a company to disclose details of their encumbered shares. At present, apart from pledge, hypothecation and non-disposal undertakings, currently there is no framework to capture the details of other types of encumbrances in the depository system.

- Accordingly, SEBI, *vide* its Circular dated July 24, 2020 has directed the depositories to put in place, a system for capturing and recording all types of encumbrances, as specified under Regulation 28(3) of SEBI Takeover Code within one month from the date of the Circular.

[13] Circular SEBI/HO/DDHS/DDHS/CIR/P/2020/123 dated July 17, 2020
[14] Circular SEBI/HO/DDHS/DDHS/CIR/P/2020/122 dated July 17, 2020
[15] Circular SEBI/HO/MRD2/DDAP/CIR/P/2020/137 dated July 24, 2020

Katalyst comments: *To ensure that the Company does not default in disclosing important matters while entering into a transaction, SEBI has tightened the norms for disclosing all types of encumbrances which in place bring discipline in functioning of an organisation.*

3. SEBI Circulars for further regulating Proxy Advisors

SEBI had rolled out the SEBI (Research Analysts) Regulations 2014[1] which requires mandatory registration of proxy advisor as a research analyst with SEBI and provides an elementary regulatory framework. Recently, SEBI has also issued disclosure standards for proxy advisory firms and codified the policy for managing conflict of interest vide its two circulars as under:

Procedural Guidelines for Proxy Advisors'[16] ('Procedural Guidelines')

Under this circular SEBI has laid key compliances to be followed by all proxy advisory firms w.e.f. September 01, 2020 are as under:

- Formulate voting recommendation policies (to be reviewed atleast once annually) which will also disclose the circumstances when such recommendation shall not be provided;
- A stated process to communicate with its clients and company, ensure sharing of the report with clients and company at the same time and timeline to receive comments from the company and specifies that if the company has a different viewpoint on recommendations stated in proxy advisors' report, then proxy advisors, after taking into account the said viewpoint, may either revise the recommendation in the addendum report or issue an addendum to the report with its remarks;
- To disclose methodologies and processes followed in development of their research and address the safeguards against possible conflict of interests on every specific document where they are giving advice.

Grievance Resolution between listed entities and proxy advisors[17]

In order to facilitate resolution of grievances of listed entities against proxy advisors, listed companies can now approach SEBI who will examine the matter for non-compliance by proxy advisors with the provisions of code of conduct under SEBI (Research Analyst) Regulations, 2014 and Procedural circular.

[16] Circular SEBI/HO/IMD/DF1/CIR/P/2020/147 dated August 3, 2020
[17] Circular SEBIHO/CFD/CMD1/CIR/P/2020/119 dated August 4, 2020

Katalyst Comments: *SEBI has tried to standardize the processes across proxy advisors registered with them. Given that the proxy advisors tend to gain certain advantage owing to the trust assigned on them by institutional investors / shareholders, these Procedural Guidelines and Grievance Resolution Circulars act as a regulatory framework in terms of conflict of interests and disclosure requirements.*

4. SEBI extends the timeline for submission of financial results under Regulation 33 of LODR Regulations, for the quarter/half-year ended on June 30, 2020 to September 15, 2020

5. SEBI amends Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 to require the listed entity to intimate the record date for events inter alia including declaration of dividend, issue of right or bonus shares, merger / de-mergers, split, to all stock exchanges where stock derivatives are available on the stock of the listed entity or where listed entity's stock form part of an index on which derivatives are available.

D. Indian Accounting Standards (IND AS) Highlights

Ministry of Corporate Affairs ('MCA') has notified amendments to Indian Accounting Standards ('Ind AS')[18]

The MCA, *vide*, Notification dated July 24, 2020 has issued Companies (Ind AS) Amendment Rules, 2020, containing amendments to certain Ind AS. Key amendments are as under:

<u>Amendment in Ind AS 103 - Business Combinations</u>

- **<u>Definition of business</u>**
  1. The requirement of identifying a business combination has been substituted to provide that the assets acquired and liabilities assumed constitute a business. If the assets acquired are not a business, the reporting entity shall account for the transaction or other event as an asset acquisition.

  2. Further, it clarified that to be considered a business, an acquired set of activities and assets must include, at a minimum, an input and a substantive process that together significantly contribute to the ability to create outputs;

[18] MCA notification No. G.S.R. 463(E) dated July 24, 2020

- **Incorporation of optional concentration test**

    iii. The amendment also added an "optional concentration test" that permits a simplified assessment of whether an acquired set of activities and assets is a business or not.

    iv. The concentration test is met if substantially all of the fair value of the gross assets acquired is concentrated in a single identifiable asset or group of similar identifiable assets.

    v. An entity may elect to apply (or not apply), the test and may make such an election separately for each transaction or other event.

Amendment in Ind AS 107 and Ind AS 109 - Financial Instruments

- Modification in relation to specific hedge accounting requirements to provide relief to the potential effects of uncertainty caused by the interest rate benchmark (IBOR) reform

Amendment in Ind AS 116 – Lessees

- Provides lessees with an exemption from assessing as to Covid-19 related rent concession is a lease modification. Further, if not a lease modification then requires the lessees to account for Covid-19 related rent concessions.
  Requires lessees to apply the exemption retrospectively in accordance with Ind AS 8 (Accounting Policies, Changes in Accounting Estimates and Errors), but not require them to restate prior period figures.

E. Others Regulatory Highlights:

1. Government notifies rules for E-commerce entities[19]

In an attempt to create more transparency for buyers, promote Indian products and reduce the stronghold of international players in India, Ministry of Consumer Affairs, Food, and Public Distribution, Government of India notified and made effective the provisions of the Consumer Protection (E-Commerce) Rules, 2020 (E-Commerce Rules) under the Consumer Protection Act, 2019 from July 24, 2020.

[19] Dept of Consumer Affairs Notification No. G.S.R. 462(E) dated July 23, 2020

The E-Commerce Rules broadly prescribe the duties of e-commerce entities which apply to all e-commerce entities irrespective of the nature of their operations. In addition, the E-Commerce Rules also prescribe: (a) liabilities of marketplace e-commerce entities; (b) duties of sellers on marketplace; and (c) duties and liabilities of inventory e-commerce entities (which include single brand and multi-channel single brand retailers as well).

Key aspects of the E-commerce Rules are as under:

- The E-Commerce players will have to display total price of goods and services offered for sale along with a break-up of other charges;

- Details such as expiry date of goods offered for sale, country of origin of goods and services, return, refund, exchange, warranty, guarantee, delivery and any other information required by consumers to make an informed decision will have to be mentioned;

- No cancellation charges shall be imposed after confirming purchase unless similar charges are also borne by the e-commerce entity;

- It forbids manipulation of price of the good and services offered on their platforms to gain unreasonable profit;

- E-commerce entities to provide information on available payment methods, the security of those payment methods, any fees or charges payable by users, contact information of service provider and also prominently display all details about the sellers offering goods and services.

- The E-commerce Rules task the E-Commerce entities to set up a robust complaint redressal mechanism which ensures that customer complaints are addressed under 48 hours and resolution is provided within one month.

- The violation of the E-commerce Rules will attract penal action under the Consumer Protection Act, 2019.

Katalyst comments: *The new E-commerce Rules make E-Commerce entities, whether Indian or foreign, accountable against unfair trade practices. As part of consumer protection law, the rules will ensure that online entities depict products accurately, do not discriminate against sellers, set up robust complaint redressal system among others.*

2. **Family settlement memorandum, once acted upon without any exception, does not require registration and is binding on family members [20]**

In this case, the family members entered into a family settlement in the year 1970 settling a dispute regarding a property. Later in 1988, as disputes again arose between the family members, memorandum of family settlement was executed by all the parties to document the terms settled between the family members. However, even after execution of the memorandum of family settlement, one of the family members raised new issues to retract from the memorandum. Thus, suit was filed by the other family member in possession of property for declaration contending that he was the owner in possession on strength of this settlement.

The issue before the SC was whether a memorandum of settlement required registration since by way of said document the interest in immovable property was transferred in favour of one of the family members.

Hon'ble SC noted that the HC not doubted the factual findings that there was not only univocal family arrangement between the parties in 1970, but it was even acted upon them without any exception. The SC relying on the judgement of Kale & Ors.[21] held that a distinction should be made between a document containing the terms and recitals of a family settlement and a mere memorandum of family settlement entered into. Thus, SC held that document executed in 1988 between the parties was merely a memorandum of settlement and it did not require registration.

It held that it is a settled legal position that when by virtue of a family settlement or arrangement, members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once and for all in order to buy peace of mind and bring about complete harmony and goodwill in the family, such arrangement ought to be governed by a special equity peculiar to them and would be enforced if honestly made. The object of such arrangement is to protect the family from long drawn litigation or perpetual strives which mark the unity and solidarity of the family between the various members of the family. Accordingly, a memorandum of family settlement does not require registration and is binding on the parties.

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[20] *Ravinder Kaur Grewal & Ors.* v. *Manjit Kaur & Ors.* [Civil Appeal no. 7764 of 2014 (SC)]
[21] *Kale & Ors.* v. *Deputy Director of Consolidation & Ors* [3 (1976) 3 SCC 119]

Katalyst Comments: *While family arrangement / settlement often becomes litigious, this ruling restates that non-registration of memorandum of family arrangement should not lead to non-binding of terms of the same on the parties.*

4. SC in the HUF context holds daughters become equal coparceners at birth even if born prior to the amendment to Hindu Succession Act, 1956[22]

The property inherited as coparcenar in a Hindu Undivided Family ('HUF') is passed on through familial decent and held jointly. Prior to the amendment, the conference of coparcenary on birth was only granted on sons, grandsons thereby leaving out daughters from acquiring coparcenary rights. However, the Hindu Succession Act was amended to that extent vide an amendment in 2005.

In this case, the SC has held that the provisions contained in substituted section 6 of the Hindu Succession Act confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities. Further, by virtue of acquiring this right at birth, it is not necessary for the father coparcener to have been alive at the time of the amendment.

In effect, the SC has ruled that the amendment would have retroactive effect in conferring rights on daughters who were alive at the time of the amendment, even if they were born prior to it.

Katalyst Comments: *This landmark ruling settles the ambiguity surrounding the nature and extent of a daughter's rights to inherit HUF property.*

5. SC holds that no interference can be made with the encashment and invocation of bank guarantee so long as the invocation was in terms of the bank guarantee[23]

In this case, the SC outlined the principle that a bank guarantee is an independent contract between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is unconditional and irrevocable. Once a demand is made in due compliance of bank guarantees, it is not open for the Bank to determine as to whether the invocation of the bank guarantee is justified so long as the invocation is in terms of the bank guarantee.

In absence of any defense which falls in any of the exceptional circumstances such as fraud, irretrievable injustice and special equities, it is not even open for the Court to interfere with

[22] *Vineeta Sharma* v. *Rakesh Sharma & ORS.* [Civil Appeal No. 32601 of 2018 (SC)]
[23] *Standard Chartered Bank* v. *Heavy Engineering Corporation Ltd. & ANR* [I (2020) BC31 (SC)]

the invocation and encashment of the bank guarantee so long as the invocation was in terms of the bank guarantee.

Katalyst comments: *While these are established principles of law, it is also important to note that every case has to be decided with reference to the facts of the case involved therein. Due to the COVID-19 outbreak, recently, several courts, on the basis of this principle, have considered the key facts of the cases involving invocation of bank guarantees and injuncted invocation of bank guarantees arising on special equities.*

F. Goods and Service Tax (GST):

1. Refund of unutilized input tax credit ('ITC') of input services is available in case of inverted duty structure

The Gujarat HC[24] has allowed the refund of unutilized ITC of input services as a part of 'Net ITC' for the purpose of computation of refund under amended Rule 89(5) of the CGST Rules, 2017 ('CGST Rules'). The HC has also held that explanation (a) of Rule 89(5) of the CGST Rules which denies the refund of unutilized ITC of input services is contrary to the provisions of section 54(3) of the CGST Act.

Katalyst Comments: *A welcome decision by the Gujarat HC, whereby refund of unutilized ITC of input services has been allowed in case of inverted duty structure. The ruling highlights how the law makers exercised the power of making rules even when the main section 54(3) of the CGST Act does not enable them to frame Rules. However, it is pertinent to note that until any amendment in Rule 89(5) of the CGST Rules is made to include input services and capital goods in purview of 'net ITC' for computation of refund amount, the litigation will continue.*

2. Indian subsidiary company providing services to parent company outside India cannot be treated as 'establishment of a distinct person' to deny export benefits

The Gujarat HC[25], in case of writ petition filed before it, has held that a subsidiary company providing services to its parent company outside India would not be treated as the 'establishment of distinct person' and benefit of export of service can't be denied to the subsidiary company. Also, HC quashed the show cause notice and allowed the writ petition and clarified that the writ petition is maintainable under Article 226 of the Indian Constitution.

[24] *VKC Footsteps India Pvt Ltd* v. *UOI* [2020-TIOL-1273-HC-AHM-GST]
[25] *Linde Engineering India Pvt Ltd & 1 other (S)* v. *UOI* [2020-TIOL-1285-HC-AHM-ST]

Katalyst comments: *A good decision by the HC, whereby the it has allowed a writ petition filed by the petitioner and SCN was quashed. Further, the decision is in the context of erstwhile service tax regime, but provisions relating to 'export of service' is the same under GST also and hence, this decision is important and can be relied upon under GST regime as well.*

3. **Place of supply of 'intermediary service' rendered to overseas customers is the "location of the supplier" even if the consideration earned in foreign exchange.**

In a writ filed by the petitioner, the Gujarat HC[26] has upheld the constitutional validity of place of supply provisions of section 13(8) of the IGST Act, 2017 which provides that place of supply of intermediary service (where either supplier or recipient is located outside India) is the location of supplier and held that it is not ultra vires Articles 14, 19, 265 and 286 of the Constitution of India.

Katalyst Comments: *The HC has clarified the constitutional validity of differential treatment adopted for determining place of supply of 'intermediary service' as per section 13(8) of the IGST Act. The court has also clarified that the basic inception of section 13(8) (b) of the IGST Act, considering the place of supply as the location of supplier, is to levy Central GST and State GST, and therefore, such services would be outside the purview of IGST.*

4. **Services relating to designing of data centre, supply of equipment, testing and commissioning of equipments etc. does not classify as works contract service due to separate and distinct value assigned to goods and services**

The Maharashtra Authority of Advance Ruling ('AAR')[27] has held that services relating to designing of data centre, supply of equipment, testing and commissioning of such equipment etc. does not qualify as works contract service as the major part of the contract is supply of goods which are sold to the client and payment of which is received separately. Further, the agreement infers that said goods and services are supplied as a combination and in conjunction with the supply of goods which is a 'principal supply'.

The AAR also provided that works contract under section 2(19) is applicable only for immovable property where the value of goods and services is not distinct, however present agreement of applicant shows the value of goods distinct and separated from value of services, hence, said project undertaken by applicant cannot be 'works contract'.

[26] *Material Recycling Association of India* vs. *Union of India & 2 Others* [TS-586-HC-2020(GUJ)-NT]
[27] In the matter of Prasa Infocom & Power Solutions Private Limited [TS-628-AAR-2020-NT]

Katalyst Comments: *Welcome ruling by the Maharashtra AAR especially in the case where there is a separate agreement for supply of goods and services in a project and rate of goods is less than 18% rate of 'works contract service'.*

5. **ITC of lease premium, annual lease rentals and maintenance charges for lease of land is not available**

The applicant acquired land on lease for the purpose of construction of a building where their own laboratory would be accommodated for which it paid charges of (i) lease premium, (ii) annual lease rentals and (iii) maintenance charges. The Telangana AAR[28] has held that no ITC of these charges is available as 'building' is classified under the category of immovable property and also section 17(5) of the CGST Act restricts ITC of construction services for the purpose of construction of immovable property on their own account.

6. **E-invoicing[29]**

Sr no.	Particulars	Remarks
1	Threshold limit	Increased from Rs.100 crores to Rs. 500 crores for B2B transaction from October 1, 2020
2	Exclusion	SEZ unit (as per sandbox portal SEZ developers are also covered under exclusion)
3	New schema	NIC has released new schema V 1.03 on sandbox on 5th August, 2020
3	New Form	Updated form INV-01 provides schema field required for IRN Generation

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[28] In the matter of Daicel Chiral Technologies (India) Pvt. Ltd. [TS-608-AAR-2020-NT]
[29] Notification no. 60 & 61-2020-CT dated July 30, 2020