Katalyst Kaleidoscope

December 2019: Tax and Regulatory Insights

A. Income-tax Highlights

1. The Taxation Laws (Amendment) Act, 2019[1]

The Taxation Laws (Amendment) Ordinance, 2019 ("Ordinance") was introduced in September 2019 (Refer our special issue on the Ordinance here). The Rajya Sabha ultimately passed the Taxation Laws (Amendment) Bill, 2019 on 5th December, 2019, and it subsequently received President's assent ("Amendment Act").

The Amendment Act has addressed and clarified certain issues which arose when the Ordinance was introduced earlier; some important changes made by the Amendment Act (as compared to the position in the Ordinance) are as under:

- **In relation to section 115BAA (Concessional tax rate ("CTR") of ~ 25% for certain domestic companies)**

  - If, in any year, the assessee seeks to claim the prohibited exemptions or deductions, or seeks to set off loss or unabsorbed depreciation attributable to such deductions, then the option to claim the concessional tax regime becomes invalid in relation to that year and succeeding assessment years.

  - A new condition has been introduced which provides that the total income of the company should be computed without any set-off or allowance of unabsorbed depreciation deemed so under section 72A (which deals with carry forward and set-off of loss and unabsorbed depreciation on amalgamation/ demerger) if such loss or depreciation is attributable to any deductions which are not allowed once a domestic company exercises such option under this section.

  - In case where depreciation allowance in respect of block of assets has not been given full effect to prior to the AY 2020-21 and the domestic company avails the option of concessional tax for the AY 2020-21, then corresponding adjustments shall be made to the WDV of such block of assets as on 1st April, 2019 in the prescribed manner.

  - In case of domestic companies who have exercised option u/s. 115BAB (~17% tax rate) and the said option has been rendered invalid due to violation of certain conditions contained therein, such domestic company can avail CTR u/s 115BAA (i.e. ~25% tax rate); please see sub-bullet 4 below (under the changes in relation to section 115BAB).

[1] rreceived President's assent on 11th December, 2019

- **In relation to section 115BAB (Concessional tax rate of ~17% for new manufacturing companies ("NMR"))**

  - In case the total income includes any income, which is neither derived from, nor incidental to the manufacturing activity, such income shall be taxed at the normal concessional rate, but no deduction allowance shall be allowed in respect thereof.

  - A transfer pricing anti-avoidance provision is also introduced, which provides that if 'excess' profits are derived by such company, then such excess profit shall be taxable under the normal tax rate i.e. ~35%

  - Further, the income-tax payable in respect of income being short term capital gains derived from transfer of a capital asset on which no depreciation is allowable, shall be computed at the rate of ~25%.

  - There are certain conditionalities for claiming concessional tax rate under this section, primarily (i) the business should not be formed by splitting up or reconstruction of a business already in existence; (ii) the plant and machinery used must be substantially new (20% old permitted) and (iii) the building should not be used previously as a hotel or convention center in respect of which a deduction u/s 80ID has been claimed. In this context, it has now been provided that if either condition (ii) or (iii) are violated in relation to claim of NMR, the assessee may exercise an option for availing CTR i.e. 25% (please see sub bullet 4 above under the changes in relation to section 115BAA). However, if condition (i) is "violated", then tax will be computed as per the normal income tax provisions which should be CTR (~25%), though in absence of express clarity, litigation cannot be ruled out as to whether the 25% rate applies or it would revert to the 35% rate.

  - The Amendment Act also clarifies that activities such as software development, mining, production of cinematograph films, conversion of marble blocks into slabs, bottling of gas and printing of books, would not be considered as "manufacture" for the purpose of availing the concessional tax rate i.e. ~ 17%.

  - The Amendment Act has introduced similar condition for section 115BAB i.e. the condition on 'no set-off of any loss or unabsorbed depreciation' referred in section 72A.

  - The Amendment Act also seeks to empower the CBDT to issue guidelines for addressing any difficulties that may arise in applying the provision with the objective to promote manufacturing.

- **Other Amendments**
  - Section 115JAA has been amended to provide that set off of MAT credit will not be available to taxpayers who have exercised the option to avail the CTR.

  - It has been provided in the Amendment Act that relief from buyback tax (on listed companies share buyback) would be available where public announcement has been made on or before July 5, 2019 as per Securities and Exchange Board of India (Buyback of Securities) Regulations, 2018.

Katalyst Comments: *The Amendment Act has sought to curb interpretational issues and ambiguities to a large extent, though some aspects unfortunately remain open. Additionally, the decision of whether to avail the option to shift to the CTR and in the case of a new manufacturing company, whether to avail the NMR by setting up a new company, will have its own set of issues and a decision needs to be taken on a holistic basis.*

2. Mumbai ITAT allows[2] depreciation claim on 'increased' WDV considering amalgamating companies' unabsorbed depreciation

- The Mumbai Tribunal accepted Amalgamated Company's plea that unabsorbed depreciation (of amalgamating companies) of preceding years can be added to arrive at WDV in the terms of Explanation 2 to Sec 43(6) (presuming that such unabsorbed depreciation is not carried forward in the hands of the amalgamated company u/s 72A of the Act).

- The Tribunal rejected revenue's view that unabsorbed depreciation should be treated as depreciation 'actually allowed' as per Explanation 3 read with Explanation 2 by holding that Explanation 3 being a deeming fiction, operates only in a particular condition and removes an anomaly, which otherwise would have been created under the other provisions of the ITA.

- The Tribunal further held that unless the unabsorbed depreciation of the amalgamating companies is carried forward in the hands of the amalgamated company u/s 32(2) of the Act, Explanation 3 cannot be read into Explanation 2 to conclude that depreciation 'actually allowed' also includes unabsorbed depreciation.

- It relied on the Apex Court judgment in the case of Doom Dooma India, Bombay High Court judgements in the case of Silical Metallurgic Ltd and Hindustan Petroleum Corporation Ltd and Madras High Court judgement in the case of EID Parry India and concluded that the WDV in the hands of the amalgamated company was to be calculated without considering the

[2] In the case of JSW Steel Limited versus DCIT (ITA No.156/Bang/2011 and CO.No.59/Mum/2012, dated 29th November, 2019)

unabsorbed depreciation of the amalgamating companies, for which set off was never allowed.

Katalyst Comments: *This decision allows amalgamating companies to add back the unabsorbed depreciation to the WDV of the block of assets being transferred to and vested in the amalgamated company, thereby shielding the WDV to the extent of depreciation not absorbed by the amalgamating companies on account of lack of profits. Therefore, as a result, the amalgamated company would be eligible to claim depreciation u/s 32 as deduction while computing business income. Certain aspects such as addition of unabsorbed depreciation to which block of assets (where different rates of depreciation are applicable) remain unresolved.*

3. Chennai ITAT allows[3] depreciation claim on goodwill generated upon slump sale

- The Assessee Company was engaged in manufacturing and wholesale trading of automatic door operators, door controls and accessories. It acquired businesses from two entities, recorded goodwill (being the difference between consideration paid and the net assets of the businesses acquired) and claimed depreciation thereon.

- The Assessing Officer, relying upon the Mumbai ITAT judgment in case of Toyo Engineering, held that since the Assessee Company did not undertake fair valuation of assets and liabilities, the Assessee Company could not be said to have purchased the goodwill and rejected Assessee Company's claim of depreciation thereon.

- The matter went up to the Tribunal, wherein the Tribunal allowed Assessee Company's claim of depreciation on goodwill generated on the acquisition of two businesses and distinguished (on facts) Mumbai Tribunal's ruling in the case of Toyo Engineering by noting that the acquisition in present case was mainly of movable assets and intangibles, and did not include any land or building.

- The Tribunal further held that the value incorporated in books of accounts by the Assessee Company reflect their fair market value, unless rebutted by Revenue, and placing strong reliance on the Madras High Court judgement in the case of Pentasoft Technologies Limited, held that the consolidated payments made by assessee over and above net assets acquired by it was towards goodwill and non-compete, and are eligible for depreciation.

Katalyst Comments: *The Chennai Tribunal upheld the commercial wisdom in this decision by underpinning the fundamental principle that, if an assessee has acquired a business at an arms'*

[3] In the case of ACIT versus Dorma India Private Limited (ITA Nos.1664 to 1666/Chny/2019, dated 20th November, 2019)

length price, then depreciation has to be permitted u/s 32 on goodwill so recorded on acquisition.

4. **Supreme Court allows[4] revised return filed beyond the time limit u/s 139(5) pursuant to NCLT approved scheme of amalgamation**

- The Transferee Companies ('Assessee Companies') filed a revised return (manually) with the tax department after the due date for filing revised return of income u/s 139(5) of the ITA, since the NCLT order approving the scheme was passed only after the said due date and the appointed date was retrospective.

- The Assessing Officer did not consider the revised returns on the ground that the revised returns were filed beyond the time limits prescribed and without obtaining permission from CBDT u/s 119 of the ITA. The Assessee Companies filed a writ petition before the Madras High Court and succeeded in quashing the order of the Assessing Officer.

- The department filed a writ petition challenging the judgment and a division bench of Madras High Court allowed the writ and reversed the order passed by the single judge. Aggrieved by the order of division bench, the Assessee Companies filed appeal before the Supreme Court

- The Supreme Court took cognizance of the fact that the Scheme provide for allowing the Transferee Companies to revise return of income beyond the timelines prescribed and the fact that the Transferee Companies filed notice of the Scheme with the tax department in compliance with section 230(5) of the Companies Act, 2013 and the tax department did not raise any objection within the stipulated period allowed.

- Further, the Supreme Court also noted the fact that the Scheme was sanctioned only after the expiry of time provided u/s 139(5) of the ITA and it was impossible for the Transferee Companies to file revised return before that date.

- The Supreme Court relied on its own decision in the case of National Thermal Power Co Ltd[5] wherein it was held that the purpose of assessment proceedings is to assess the tax liability of an assessee correctly in accordance with law. It noted that section 170(1) of the ITA requires the department to assess the total income of the successor after the date of succession and the transferor companies have been succeeded by the Transferee Companies from the appointed date (date of succession), allowed the appeal filed by the Transferee Companies and directed the department to consider the revised returns filed by the Assessee Companies for completion of assessment proceedings.

[4] In the case of Dalmia Power Limited & Anr versus ACIT (Civil Appeal Nos.9496-99 of 2019, dated 18th December, 2019)
[5] (1997) 7 SC 489

5. CBDT issues draft notification[6] seeking inputs for framing of rules with respect to Fund Manager Regime under Section 9A of the Income Tax Act, 1961 ("ITA")

CBDT has issued draft notification for the manner of computation of amount required for satisfaction of condition of clause (m) of sub-section (3) of section 9A of the ITA.

Public Comments have been invited by 19th December, 2019 at ustpl1@nic.in.

Katalyst Comments: *Section 9A of ITA provides for a special taxation regime in respect of certain offshore funds in the context of their fund managers being located in India. It is provided that in case of an eligible investment fund, the fund management activity carried out through an eligible fund manager acting on behalf of such fund, shall not constitute business connection in India of the said fund. Further, it is provided that an eligible investment fund shall not be said to be resident in India merely because the eligible fund manager undertaking fund management activities on its behalf is located in India subject to the conditions mentioned in sub-section (3) of section 9A, one of which [clause (m) of said subsection] provides that the remuneration paid by the fund to an eligible fund manager in respect of fund management activity undertaken by him on its behalf is not less than the arm's length price of the said activity.*

Finance (No 2) Act, 2019 with effect from 1st April, 2019, inter alia, amended the said clause (m) so as to provide that the remuneration paid by the fund to an eligible fund manager in respect of fund management activity undertaken by him on its behalf is not less than the amount calculated in such manner as may be prescribed. The draft notification provides for the manner of computation of amount required for satisfying the above conditions.

B. Corporate Law Highlights and Insolvency and Bankruptcy Code

1. Ministry of Corporate Affairs ("MCA") notification[7] on Companies (Meetings of Board and its Powers) Rules, 2014

MCA has revised the thresholds for Related Party Transactions ("RPTs") prescribed under Section 188(1) of the Companies Act, 2013 ("Cos Act"), requiring prior approval via shareholders resolution. A summary of the extant and revised thresholds are summarized as under:

[6] Press Release dated 5th December, 2019
[7] Notification No. G.S.R. 857(E), dated 18th November, 2019

Sr	Extant Thresholds	Revised Thresholds
1.	Sale, purchase or supply of goods / material, amounting to 10% or more of the turnover or Rs. 100 crores, whichever is lower.	Sale, purchase or supply of goods / material, amounting to 10% or more of the turnover
2.	Selling or otherwise disposing of or buying property of any kind, amounting to 10% or more of net worth of the company or Rs. 100 crores, whichever is lower.	Selling or otherwise disposing of or buying property of any kind, amounting to 10% or more of net worth of the company.
3.	Leasing of property of any kind amounting to 10% or more of the net worth of the company or 10% or more of turnover of the company or Re. 100 crores, whichever is lower.	Leasing of property of any kind amounting to 10% or more of turnover of the company.
4.	Availing or rendering of any services, amounting to 10% or more of turnover of the company or Rs. 50 crores, whichever is lower.	Availing or rendering of any services, amounting to 10% or more of turnover of the company.

Katalyst Comments: *The monetary thresholds for triggering the requirement of obtaining shareholders' approval for RPTs have been done away with and the thresholds have now been only linked to Turnover / Net Worth, as the case may be, thereby liberalising the need for shareholders' approval.*

2. National Company Law Appellate Tribunal ("NCLAT") reverses[8] the decision of National Company Law Tribunal ("NCLT) which earlier permitted merger of an LLP with a company

- The National Company Law Tribunal ("NCLT"), Chennai Bench, had sanctioned the merger of an Indian Limited Liability Partnership ("LLP") with a private limited company u/s 230-232 of the Cos Act by applying the principle of *Casus Omissus* i.e. since a foreign body corporate is permitted to be merged with an Indian company, there should not be any bar on merger of an Indian LLP (which is a body corporate as well) with another Indian company.

- Aggrieved by the said order, the Ministry of Corporate Affairs, represented by the Regional Director, Southern Region and Registrar of Companies, Chennai jointly filed an appeal before the NCLAT.

[8] In the case of merger of Real Image LLP with Qube Cinema Technologies Private Limited) Company Appeal (AT) No. 352 of 2018, dated 4th December, 2019)

- The NCLAT relied upon the decision of the Hon'ble Supreme Court in case of Union of India vs Rajiv Kumar[9] and held that the principle of *Casus Omissus* cannot be applied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself. Further, NCLAT held that there are enabling provisions under the Cos Act for conversion of an LLP into a Company and vice-versa under the LLP Act and thus there is no question of infringement of any constitutional right, thereby reversing NCLT's order, rejecting the merger of an LLP into a Company.

Katalyst Comments: *In the past, the Mumbai Bench of NCLT has also allowed the merger of LLP into a Company in the case of Vertis Microsystems LLP with Forgeahead Solutions Private Limited[10]. The judgment of NCLAT presumably puts the controversy of merger of LLP into Company to rest. (one will have to see if the decision of NCLAT is challenged in the Apex Court)*

3. NCLAT[11] restores Mr. Cyrus Mistry as the Executive Chairman of Tata Sons Limited and declares conversion of Tata Sons Limited from a public company into a private company as illegal

In a major relief to the ousted chairman of Tata Sons Limited, Mr. Cyrus Mistry, NCLAT has ruled by declaring his ouster by Tata Sons Limited as illegal and thereby, inter alia, restoring his position as the Executive Chairman of Tata Sons Limited. Key observations/ directions passed by the NCLAT in relation to the same are as under:

- The proceedings of the board meeting (on 24th October, 2016) of Tata Sons Limited insofar as it relates the sudden removal Mr. Cyrus Mistry without following due procedure under the Companies Act, 2013 were declared illegal and therefore, set aside; effectively, therefore, the NCLAT directed that Mr. Cyrus Mistry be restored as the Executive Chairman of Tata Sons Limited and as director in other Tata Group companies;

- However, with a view to ensure smooth functioning of Tata Sons Limited, NCLAT also directed that the judgment, insofar as it relates to restoration of Mr. Cyrus Mistry as the Executive Chairman, be suspended for a period of four weeks and that the rest of the judgment be complied forthwith;

- NCLAT further observed that the conduct of the affairs of Tata Sons Limited were prejudicial and oppressive to the minority shareholders i.e. the companies belonging to the Shapoorji Pallonji Group holding approximately 18% in Tata Sons Limited;

[9] 6 Supreme Court Cases 516 (2003)
[10] TCSP 190 and 191 of 2017, dated 23rd March, 2017
[11] In the case of Cyrus Investments Private Limited Versus Tata Sons Limited & Ors (Company Appeal (AT) No. 254 of 2018) and Cyrus Pallonji Mistry versus Tata Sons Limited (Company Appeal (AT) No. 268 of 2018)

- Conversion of Tata Sons Limited from a public company into a private company (so as to restrict the free transferability of shares by the Shapoorji Pallonji Group) was declared illegal by the NCLAT;

- NCLAT further expunged certain observations made by the NCLT against Mr. Cyrus Mistry which were not only disparaging but also unsubstantiated by any document on record.

Katalyst Comments: *NCLAT, in this decision, has set a strong precedent upholding the principles and basic tenets of company law in relation to protection of minority shareholders and good governance. From press report, it appears that the decision is likely to be challenged in Supreme Court by the Tatas, and one will need to wait for the final verdict on this biggest Indian corporate board-room battle.*

4. Release[12] of Company Law Committee Report on decriminalization of provisions of the Companies Act, 2013

The Company Law Committee ("Committee") was constituted by the Ministry of Corporate Affairs in September, 2019, inter alia, to further decriminalize the provisions of the Companies Act, 2013 based on their gravity and to take other concomitant measures to provide further 'ease of living' for corporates in the country.

Accordingly, the Committee has released a 102-pager report ("Report") wherein the Committee has proposed amendments in 46 penal provisions with an intention to declog the Special Courts and NCLT, thereby also improving the ease of living for corporates and other stakeholders of the country.

The main recommendations of the Committee, included in Chapter I of the Report, are as follows:

- Re-categorising of 23 offences out of 66, which are in the category of compoundable offences, to an in-house adjudicating framework
- Omitting 7 compoundable offenses, limiting 11 compoundable offenses to fine only and recommending 5 offenses to be dealt with in an alternate framework
- No change in respect of non-compoundable offenses

Further, the recommendations related to ease of living are included in Chapter II of the Report.

Public Comments were invited by 25th November, 2019 at comments.clc2019@mca.gov.in

[12] dated 14th November, 2019 (MCA release date 18th November, 2019)

Katalyst Comments: *The Report detailing the recommendations proposed by the Committee is extensive and has sought to deal with the gravity of the issues faced by corporates by providing exhaustive recommendations. One will need to see what is finally legislated.*

5. The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019 ("IBC Bill") introduced[13] in Lok Sabha

The IBC Bill was introduced in Lok Sabha on 12th December, 2019. Key highlights of the IBC Bill, inter-alia, include:

- The Insolvency commencement date in all cases will mean the date of admission of an application for initiating CIRP
- Minimum Threshold for home buyers to file insolvency application shall be at least 100 allottees under a real estate project or 10% of the total number of such allottees, whichever is less
- Any corporate debtor who is disqualified from making an application for CIRP initiation u/s 11(a) to (d), shall not be prevented from initiating CIRP against another corporate debtor.
- Resolution Professional to continue to manage the operations of the corporate debtor after expiry of CIRP Period until resolution plan is approved or liquidator is appointed

C. RBI and Foreign Exchange Regulations Highlights

1. RBI revises[14] guidelines on liquidity risk management ("LRM") for NBFCs

RBI has issued a circular to revise the extant guidelines on LRM for NBFCs. All non-deposit taking NBFCs with asset size of ₹ 100 crore and above, systemically important Core Investment Companies and all deposit taking NBFCs, irrespective of their asset size, are required to adhere to the revised set of LRM guidelines. However, these guidelines will not apply to Type 1 NBFC-NDs[15], Non-Operating Financial Holding Companies and Standalone Primary Dealers.

Katalyst Comments: *The guidelines state that it will be the responsibility of the Board to ensure compliance of the above-mentioned guidelines. The internal controls required to be put in place by NBFCs as per these guidelines shall be subject to supervisory review. Further, as a matter of*

[13] Bill No. 376 of 2019
[14] RBI/2019-20/88 DOR.NBFC (PD) CC. No.102/03.10.001/2019-20, dated 4th November, 2019
[15] Type I - NBFC-ND are NBFCs not accepting public funds/ not intending to accept public funds in the future and not having customer interface/ not intending to have customer interface in the future

prudence, all other NBFCs are also encouraged to adopt these guidelines on liquidity risk management on voluntary basis.

2. Amendments to FEM (Non-debt Instruments) Rules, 2019

In our last month's publication (link), we outlined the overhaul of Regulations governing Foreign Investments in India and the distinction between powers of Central Government and Reserve Bank of India ("RBI"). The Foreign Exchange Management (Transfer and Issue of Security by a Person Resident Outside India) Regulations, 2017 ("FEMA 20(R)") have effectively been split into the following 3 Regulations/ Rules[16]:

1(a): FEM (Non-debt Instruments) Rules, 2019 ("Non-Debt Rules") - notified by the Central Government
1(b): FEM (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 – notified by RBI
2: FEM (Debt Instruments) Regulations, 2019 – notified by RBI

The Non-Debt Rules also supersedes the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018.

The Central Government has now issued a notification[17] amending the Non-Debt Rules, which inter-alia includes:

- Exclusion of debt component while computing sectoral cap for the purposes of foreign direct investment (earlier, debt component was included towards computation of sectoral caps, thereby, restricting the amount of foreign direct investment in the form of equity);

- Permissibility of gift of shares held by a person resident in India to a person resident outside India held either on repatriation basis or non-repatriation basis, subject to approval of RBI (earlier, gift, subject to RBI approval, of shares held only on non-repatriation basis by persons resident in India was permitted);

- Clarification that, in case of convertible instruments, conversion formula would need to be determined upfront, which shall not be lower than the fair market value;

- Clarity on the term "manufacturing" to include contract manufacturing as well within the ambit of the said term.

[16] Notifications dated 17 October 2019
[17] Notification dated 5 December 2019

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

1. SEBI has issued clarifications by way of FAQs on SEBI (Prohibition of Insider Trading) Regulations 2015 ("PIT Regulations")[18]

SEBI has clarified the following points vide FAQs on PIT Regulations:

a) No pre-clearance required for exercise of stock options.
b) Trading in ADRs and GDRs of listed companies are covered under the relevant provisions of PIT Regulations. Therefore, Designated Persons shall be required to follow the Code of Conduct for trading in Depository Receipts.
c) The relevant Company is required to maintain the names (along with the Permanent Account Number) of the fiduciary or intermediary with whom it has shared information in its Structured Digital Database.
d) Upon resignation of a designated person, all information which is required to be collected from the designated persons, should be collected till date of service with the company. The company should also maintain updated address and contact details of such person. Such data should be preserved for 5 years.

2. Circular[19] on SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("SEBI LODR Regulations")

SEBI has issued circular on disclosures requirements to be followed by listed entities on defaults on payment of interest/ repayment of principal amount on loans from banks / financial institutions and unlisted debt securities. The said disclosures are to be made from the period beginning 1st January 2020.

Katalyst Comments: *Currently, SEBI LODR Regulations require disclosure of material events / information by listed entities to stock exchanges. Specific disclosures are required under the SEBI LODR Regulations in certain matters such as delay / default in payment of interest / principal on debt securities such as Non-Convertible Debt (NCDs), Non-Convertible Redeemable Preference Shares (NCRPS) etc. Such disclosures are generally not made by listed entities with respect to loans from banks and financial institutions. SEBI's endeavor seems to be to provide increasing amounts of material information to the stakeholders.*

[18] FAQs issued by SEBI, dated 5th November, 2019
[19] Circular SEBI/HO/CFD/CMD1/CIR/P/2019/140, dated 21st November, 2019

3. **Circular[20&21] relating to Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014 ("REIT Regulations") and Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014 ("InvIT Regulations")**

   SEBI has issued detailed guidelines for preferential issue of units and institutional placement of units by a listed Real Estate Investment Trust (REIT) under the REIT Regulations and by a listed Infrastructure Investment Trust (InvIT) under the InvIT Regulations, replacing the earlier guidelines issued by SEBI in 2018. SEBI has now distinguished two different channels of preferential allotment i.e. preferential issue to anyone or institutional placement. The latter channel has certain more relaxations (such as non-applicability of 1-year lock-in which is applicable otherwise), thereby, aiming to stimulate institutional interest in the Indian real estate and infrastructure space.

4. **SEBI issues Informal Guidance[22] by way of interpretive letter under the SEBI (Informal Guidance) Scheme, 2003 in relation to applicability of PIT Regulations**

   SEBI has issued an interpretive letter (informal guidance) on the applicability of contra trade restrictions in respect of a designated person holding shares in different capacities. Brief facts are as under:

   Mr. P, a promoter of listed company, held shares in the following capacities:
   a) In his individual capacity,
   b) As a trustee for the benefit of his family,
   c) As a trustee for the benefit of beneficiaries other than his family, and
   d) As an executor of various wills

   The clarifications sought from SEBI and SEBI's responses are as under:

   i. Whether, Mr. P will be considered a designated person for the shares held by him under his personal capacity alone or for all the shares held under all the capacities?
      SEBI's interpretation: Once the determination of 'designated person' under the PIT Regulations is done, the restrictions of contra trade would be applicable to the designated person irrespective of the capacities in which such person holds shares in the company.

   ii. In case Mr. P is considered a designated person for all the capacities, will the restrictions of contra-trade provided in the PIT Regulations be applicable to all the shares held in all the capacities collectively or individually?
      SEBI's interpretation: If Mr. P is specified as a 'designated person' under the PIT Regulations, the restrictions of contra trade would be applicable to all the shares under the PAN of Mr. P, irrespective of the capacities in which Mr. P holds shares in the company.

[20] Circular SEBI/HO/DDHS/DDHS/CIR/P/2019/142, dated 27th November, 2019
[21] Circular SEBI/HO/DDHS/DDHS/CIR/P/2019/143, dated 27th November, 2019
[22] SEBI/HO/ISD/OW/P/2019/31266/1, dated 25.11.2019

iii. Whether, the restrictions of contra-trade will be applicable to any shares held under a trust not under the PAN of Mr. P but under PAN of other trustees of the trust?
SEBI's interpretation: The restrictions of contra-trade will be applicable to shares held by any designated person. Thus, if a trustee holds shares under his own PAN, restrictions of contra-trade will be applicable if such trustee is a 'designated person' under the PIT Regulations.

E. Competition Commission of India ('CCI")

CCI proposes amendments to Combination Regulations

CCI has issued a draft notification[23] proposing amendments to the CCI (Procedure in regard to the transactions of business relation to Combinations) Regulations, 2011 ('Combination Regulations').

As per the draft notification, a proposed combination involving acquisition of shares pursuant to a public bid or in a stock exchange may be pursued to that extent provided:

a) the acquirer gives notice under regulation 5 (combination notice) or regulation 5A (green channel mechanism) without delay; and
b) the acquirer does not exercise any right attached to the shares and/or influence the target enterprise, in any manner.

In case of compliance with the above conditions, the acquisition of shares would not amount to giving effect to the combination.

Public Comments on the aforesaid draft notification were invited by 15th December, 2019 on combination@cci.gov.in.

Katalyst Comments: *This is a welcome initiative and in line with the Government's objective of ease of doing business in India.*

F. Others

1. Ministry of Finance notifies[24] date for applicability of amendments to Indian Stamp Act, 1899

Finance Act 2019 (No.1) had made certain amendments to Indian Stamp Act, 1899 (Refer our KK February 2019: Interim Budget Special Issue here for more details) with effect from a date to be notified by the Central Government.

[23] dated 26th November, 2019
[24] S.O. 4419(E) dated 10th December, 2019

The Central Government has now appointed 9th January, 2020 as the date from which the above amendments will become effective.

Katalyst Comments: *This notification was much awaited, since there were certain key amendments (in relation to securities) to the Indian Stamp Act, 1899.*

2. CBDT releases[25] annual report on the Advance Pricing Arrangement ("APA") Programme of India for the year 2018-19

The CBDT has released an annual report on APA for the year 2018-19. Some key highlights (and our comments) are as under:

- The APA Programme has been there since 2012 and 271 APAs have been signed and 82 disposed off otherwise; however, 802 are still pending.
- Out of 1155 total applications filed, 944 are unilateral and 211 are bilateral applications.
- The average time taken to conclude the 41 unilateral APAs done during 2018-2019 is 45 months; while this is not unusual in other jurisdictions also, the issue is that with 802 applications pending, this can take a very long time to clear and it is causing serious frustration amongst the applicants.
- There is an interesting analysis on the nature of covered transactions; the top 6 are royalty/royalty fees, payment for IT services, payment for administrative support services and management services, purchase of finished goods and on the receipt side, fees for rendering IT and IT enabled services.
- The top 5 countries with whom APAs are signed are USA, UK, Singapore, Germany and China.
- More than 80% of the APAs have been concluded on the basis of the TNMM method.

G. Goods and Service Tax Highlights

1. The input tax credit ('ITC') of detachable sliding glass partitions fixed to immovable property is NOT available

The Karnataka Authority of Advance Ruling ('AAR')[26] has held that ITC is not available on detachable sliding and stacking glass which is movable in nature and capitalized as furniture and not as immovable property as the said activity amounts to addition or alteration of immovable

[25] Web released on 29th November, 2019
[26] In the matter of We Work India Management (P) Ltd. 2019-TIOL-416-AAR-GST]

property and the term "construction" includes re-construction, renovation, additions or alternation or repairs to the extent of capitalization of said immovable property. However, the AAR has allowed the ITC of fixing of detachable wooden flooring and held that the same does not form part of construction of immovable property.

Katalyst Comments: The AAR has wrongly interpreted the provisions of blocked credit. Section 17(5) (d) of the CGST Act restricts ITC of inputs/input services used for 'construction' of immovable property. The detachable sliding and stacking glass fastened to the building cannot be considered as inputs used for the 'construction' (alteration/addition) of immovable property and hence, ITC should be allowed. Further, the AAR has also not taken into consideration, the judgment given by the Orissa High Court in case of M/s Safari Retreats Pvt Ltd and Another[27], wherein ITC for inputs and input services used for construction of mall, intending for letting out for rent, was allowed.

2. Filling foundation/plinth with 'silver-sand' is works contract and not supply of goods

The Appellate Authority[28] for Advance Ruling of West Bengal, has held that activity of filling in compound, tank, lowland, etc. with silver sand and earthwork in layers, including spreading and compacting is a 'work contract' service and rejected applicant's plea that principal supply is supply of silver sand/goods and contract is for composite supply of goods.

Katalyst Comments: This judgment has added ambiguity to the issue of determining whether the activity can be classified as 'works contract service' or 'composite supply of goods'.

3. E- invoicing and Quick response('QR') code[29]- mandatory w.e.f. 1st April, 2020- Important aspects

For B2B supplies

- A registered person whose aggregate turnover in a financial year (FY) exceeds INR 100 crores will be required to prepare an "e-invoice" after obtaining a unique Invoice Reference Number (IRN) from the specified GST portal.
- Invoices issued without an IRN generated as above will be treated as invalid.
- This will eliminate the requirement to issue duplicate/triplicate invoice copies

For B2C supplies

- An invoice issued by a registered person whose aggregate turnover in a FY exceeds INR 500 crores for the supply of goods and services to an unregistered person is required to have a QR Code.

[27] 2019-TIOL-1088-HC-ORISSA-GST
[28] In the matter of Ashis Ghosh [TS-1093-AAAR-2019-NT]
[29] Notification no. 68/2019 to 72/2019-Central Tax dated 13th December, 2019

- Where a registered person makes a Dynamic QR code available to the recipient through a digital display, such B2C invoice issued by such registered person containing cross-reference of the payment using a Dynamic QR code, shall be deemed to be having Quick Response (QR) code.

Katalyst Comments: It seems to be Government's move towards digitization. However, from business perspective, it requires huge investments in terms of upgradation of IT systems and training of personal across various types of industries.

4. Key recommendations of 38th GST Council meeting held on 18th December, 2019

- Grievance Redressal Committees (GRC) to be constituted at Zonal/State level with both CGST and SGST officers and including representatives of trade and industry and other GST stakeholders (GST practitioners and GSTN etc.)

- Due date for annual return in FORM GSTR-9 and reconciliation statement in FORM GSTR-9C for FY 2017-18 to be extended to 31st January, 2020.

- ITC to the recipient in respect of invoices or debit notes that are not reflected in FORM GSTR-2A shall be restricted to 10% of the eligible credit available in respect of invoices or debit notes reflected in FORM GSTR-2A.

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