KATALYST
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Katalyst Kaleidoscope

December 2020: Tax and Regulatory Insights

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A. Income Tax

1. Mumbai ITAT: Sum received by partner on retirement from firm, non-taxable capital receipt[1]

Dr. Vithal V. Kamat ('assessee') along with five others entered into a partnership to develop and construct a sports complex and flats. Subsequently, the assessee retired as a partner through a 'deed of admission and retirement' and received retirement benefit as the settlement of assessee's right, title, and interest in the partnership amounting to Rs. 48.15 crores. Assessee claimed the retirement benefit to be exempt from tax; the Revenue held that assessee gave up his development and possession right over the plot of land which amounted to transfer of a capital asset and, as a consequence, revenue assessed the retirement benefit as Long-term Capital gains in the hands of the assessee.

In view of ratio laid down by the Apex Court and High Courts under similar facts, ITAT held that the amount of money received on retirement by assessee from the Partnership firm is neither in lieu of capital asset, nor a 'transfer' within the meaning of section 2(47) of Income Tax Act, 1961 ('ITA').

Katalyst Comments:

The issue of capital gains taxation of partnership on distribution of assets on retirement has been a matter of long drawn litigation, and still continues to be so. While the Mumbai ITAT has correctly upheld the principle laid down by the Supreme Court in case of Mohanbhai Pamabhai[2](i.e. no capital gains tax should be attracted in the hands of retiring partner), there are also some decisions by appellate authorities that have held that capital gains tax is chargeable, either in the hands of partners or the partnership firm. The conflict between the judicial views and the provisions of section 45 of the ITA needs to be clarified (on basis of the non-taxability as per the Supreme Court Judgement), in the interest of certainty and to curb unwarranted litigation.

2. Madras High Court: Share transfer to a wholly-owned subsidiary who in turn transferred stake in favour of a third party investor for a consideration was not considered a gift to subsidiary under section 47(iii) of the ITA[3]

The assessee had acquired shares in a Dubai company ('RG'), making it a wholly owned subsidiary. After about four years, assessee set up a wholly owned subsidiary company in Mauritius ('RM'), which in turn, set up a wholly owned subsidiary in a tax haven country

[1] Dr Vithal V Kamat (ITA No. 3870/M/2018) dated 6 November 2020
[2] CIT v. Mohanbhai Pamabhai - [1973] 91 ITR 393 (SC)
[3] Redington (India) Ltd. [2020] 122 taxmann.com 136 (Madras) dated 10 December 2020

Cayman Island ('RC'). Within two months of its incorporation, the assessee transferred its entire shareholding in RG to RC. Within four days of such transfer, 27.17% stake in RC was transferred in favour of a third-party investor for a consideration.

It was found that Board of assessee took a decision to transfer its entire holdings in RG to RC, but it did not consider it to be a gratuitous transfer and deed of share transfer also did not spell out that it was for consideration. Madras High Court held that the transaction of transfer was not merely a gift to subsidiary company under section 47(iii) of the ITA. The High Court observed that since a step-down subsidiary ('RC') was created by assessee in a tax haven to act as a conduit to escape rigour of Indian Tax Laws and sole intention of assessee was for corporate re-structuring, transaction was in fact transfer of capital asset by assessee to its subsidiary and the same would be liable to tax under section 45.

Katalyst Comments:

The High Court looked at the entire series of transactions, instead of considering the transfer to a wholly owned subsidiary as an isolated transaction, and ruled accordingly, upholding the general principle of substance over form.

3. Hyderabad ITAT: Unabsorbed depreciation of dissolved firm allowable to successor proprietorship[4]

Yerram Venkata Subba Reddy ('assessee') was a partner of a firm, which had five other partners, who retired from the firm with their capital accounts leaving the capital assets of the firm undistributed and, as a consequence, the firm was dissolved and the business of the firm was succeeded by the assessee in his individual capacity. The assessing officer, *inter alia*, disallowed the set-off of brought forward unabsorbed depreciation of Rs. 5.47 crores by citing that no provision allows carry forward of unabsorbed depreciation of a dissolved firm to an individual.

ITAT, relying on Supreme Court decision in the case of A. Dharma Reddy[5] and Madras High Court's decision in the case of N. Krishnammal[6], held that the assessee continued the business of the firm as a successor-in-business, albeit in his individual capacity. Therefore, in view of the provisions of section 32(2) whereby any unabsorbed depreciation becomes the depreciation of the current year of the business and in view of section 170 of the ITA, pursuant to which the assessee becomes the successor of the firm's business, the unabsorbed

[4] Yerram Venkata Subba Reddy (ITA No. 1119/Hyd./2018) dated 4 November 2020
[5] A.Dharma Reddy (1969) 73 ITR 751 dated 19 February 1969
[6] N. Krishnammal 147 ITR 431 dated 3 August 1982

depreciation of the dissolved firm was allowed to be set-off against the assessee's individual income.

Katalyst Comments:

ITAT's decision has highlighted an important distinction between carry forward and set-off of losses and set-off of unabsorbed depreciation i.e. the carry forward of unabsorbed depreciation is governed by section 32(2) and therefore, the restrictions on carry forward of losses under Chapter VI provisions should not apply to unabsorbed depreciation (unless specifically provided). ITAT has also clarified that by virtue of succession, the successor, by virtue of taking over the entire business, would also take over unabsorbed depreciation which becomes depreciation as per section 32(2).

4. Mumbai ITAT ruling on stay petition filed by Grasim Industries Ltd.[7]

Pursuant to a composite scheme of arrangement, Aditya Birla Nuvo Ltd had merged with Grasim Industries Ltd ('assessee company') and the financial services business was demerged into Aditya Birla Capital Limited ('ABCL'). The AO had taken a view that the demerger was not in accordance with section 2(19AA) of the ITA and opined that the shares of ABCL issued to shareholders of Grasim pursuant to the demerger should be taxable as deemed dividend under section 2(22)(e) of the ITA. The demand raised by the AO was reduced by the CIT(A) to Rs. 3,786 crores.

In the context of the above, while an appeal was pending before CIT(A), the assessee had filed a writ petition with the Bombay High Court with a pending stay application u/s 220(6) before AO and the High Court directed AO vide order dated 1 October 2019 to dispose of the said petition. The AO rejected the request for a blanket stay and directed the assessee company to pay 20% of the outstanding demand.

The assessee filed a stay application with the ITAT. In view of the approach being taken by the AO of not initiating recovery of the demand since the Bombay High Court's decision continues in absence of hearing, the ITAT observed that "given the considerate approach adopted by the field authorities, there is no need to pass a stay order in this case". Therefore, Mumbai ITAT declined to go into the merits of petition and also did not give any directions to the assessee company regarding the payment of the demand. However, the ITAT directed the AO to give at least one week's notice to the assessee before resorting to any coercive recovery measures.

[7] Grasim Industries Limited SA No. 226/Mum/2020 in ITA No 1935/Mum/20 dated 18 December 2020

5. Karnataka High Court: Affirms Special Bench's decision allowing ESOP discount under section 37[8]

Biocon Ltd ('assessee') floated Employee Stock Option Plans ('ESOP') scheme and under the scheme constituted a trust. The shares of the assessee were transferred to the trust at face value and options were given to the employees of the assessee to buy the shares within the time prescribed under the scheme. The assessee claimed the difference of market price and allotment price as discount and claimed deduction under section 37(1) of the ITA.

Karnataka High Court stated that there is no requirement of pay out of expenditure under section 37(1). It also stated that section 37(1) does not envisage incurrence of expenditure in cash. Further, the High Court, relying on Supreme Court decision in case of Bharat Earth Movers[9] and Rotork Controls India P. Ltd[10], held that discount on issue of ESOPs is not a contingent liability but is an ascertained liability. Karnataka High Court also held that, the expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount, where the assessee absorbs the difference between the price at which it is issued and the market value of shares, would also be an expenditure incurred for the purposes of section 37(1).

Katalyst Comments:

Karnataka High Court has reaffirmed the principle already laid down by other High Courts allowing discount on issue of ESOPs as a deductible business expenditure. In any case, such discount should have been deductible even as per the basic principles for determining income under section 29 of the ITA expounded by judicial precedents stating that income is to be computed after allowing deductions based on ordinary principles of commercial accounting.

6. Supreme Court: Joint Venture (AOP) not liable to tax where members taxed at MMR[11]

The assessee was a joint venture between Backbone Project Ltd and Backbone Constructions Ltd constituted through a joint venture agreement and having status of Association of persons ('AOP'). The assessee AOP declared gross business receipts and the same were distributed by the assessee AOP to its members in the participation ratio. Accordingly, the assessee AOP filed Return of Income at NIL and claimed the entire amount of TDS as refund from IT department. Members of the assessee AOP had duly shown the share of income from the assessee AOP in their Return of Income and duly paid the taxes thereon.

[8] M/s Biocon Ltd ITA.No.653 of 2013 dated 11 November 2020
[9] Bharat Earth Movers (2000) 112 Taxman 61 (SC) dated 9 August 2020
[10] Rotork Controls India Pvt Ltd (2009) 180 Taxman 422 (SC) dated 12 May 2020
[11] Backbone Projects Ltd. TS-595-SC-2020 dated 19 November 2020

Ahmedabad High Court enunciated that no loss had been caused to the revenue since the assessee AOP and the members were being taxed at Maximum Marginal Rate ('MMR'). Further, High Court held that there will not be any tax liability on the income of the joint venture if the same income has been offered to tax by the members of the joint venture by placing reliance on CBDT Circular No. 7/2016.

In light of the above, Supreme Court dismissed the Special Leave Petition against High Court's order, upholding the ruling of the High Court.

Katalyst Comments:

The question regarding what constitutes an AOP and the taxation of AOP has been a contentious issue, till some clarity was provided by CBDT circular 7/2016 which laid down attributes for determining whether a consortium can be characterised as an AOP. Generally, an AOP is taxed at MMR and as per section 86 of the ITA, if the AOP's income is taxed at MMR, the member's share is exempt in their hands. However, in this case, the members paid taxes on their share at MMR instead of the AOP.

7. Kolkata High Court: Shares issued against book adjustments not an unexplained cash credit under section 68 of the ITA[12]

Josan Deposits & Advances Pvt Ltd (assessee) had raised share capital worth Rs. 92.50 crores by issuing its shares at a premium to other companies in lieu of the shares held by the said companies. There was no actual cash inflow involved since the shares were allotted by the assessee company to adjust the shares purchased from another company. Revenue made an addition of Rs. 92.5 crores as unexplained cash credit under section 68.

ITAT acknowledged the fact that there was no real inflow of cash involved in the transaction. Further, ITAT observed that the transactions were entered into the books of the assessee by way of journal entries only which did not involve any credit to the cash account. Finally, ITAT, relying on the High Court decision in case of Jatia Investment Co, held that since there was no cash inflow involved, as the transaction is entered in the books by merely passing journal entries, thus, addition under section 68 was not invocable.

8. Cairn wins arbitration in tax dispute; India asked to pay USD 1.2 billion in damages[13]

India has been asked to pay Cairn Energy Plc USD 1.2 billion in damages, after an Arbitration Tribunal in Hague ('Hague Tribunal') ruled, in the context of the India – UK Bilateral investment

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[12] M/s Josan Deposits & Advances Pvt Ltd I.T.A. No. 2096/Kol/2017 dated 3 December 2020
[13] Various press reports dated 23 December 2020

protection treaty, in favour of Cairn in the retrospective tax demand case. The tax demand was in connection with capital gains related to the 2007 listing of its Indian unit. Cairn took the matter to arbitration in 2015, to contest a demand raised in 2014, by the Indian tax department, for USD 1.4 billion in taxes.

Cairn Energy Plc, an oil exploration company, had sold Cairn India to Vedanta in 2011, retaining a 10 percent stake in its Indian unit. The Hague Tribunal has unanimously ruled that India had breached its obligations to Cairn under the UK-India Bilateral Investment Treaty and has awarded to Cairn damages of USD 1.2 billion plus interest and costs, which shall be payable by the Indian Government.

Katalyst Comments:

This award comes soon after the Vodafone Arbitration award, wherein Vodafone won the international arbitration case pertaining to 'indirect transfer' tax under the India-Netherlands Bilateral investment protection treaty, in September 2020. In the tax dispute with Vodafone, as per the latest news reports, the Indian Government has challenged the ruling of Hague-based Permanent Court of Arbitration in Singapore Court.

It appears that from an international tax standpoint, India has clearly been in the limelight, but not for the right reasons. Such prolonged tax litigations (and constantly seeming to contest even international arbitration) have adversely impacted international sentiment, and has, and will likely be, a dampener for foreign investments into India.

B. Corporate Law Highlights

MCA defers applicability of the Companies (Auditor's Report) Order, 2020 to 1 April 2021[14]

MCA had notified the Companies (Auditor's Report) Order, 2020 ('CARO 2020') on 25 February 2020 in supersession of the Companies (Auditor's Report) Order, 2016, and had increased the specified list of matters to be reported in the Auditor's Report (details covered in Katalyst Kaleidoscope March 2020 edition).

The applicability of CARO 2020 had been extended to FY 2020-21 (instead of FY 2019-20) in March 2020. Now, the applicability is further extended to financial year commencing from 1 April, 2021.

[14] S.O. 4588(E) dated 17 December 2020

C. Securities' Law Highlights

1. SEBI to amend SEBI (ICDR) Regulations, 2018 and remove applicability of Minimum Promoters' Contribution and subsequent lock-in requirements for issuers making further Public Offer and minimum public shareholding in case of companies involved in Insolvency Resolution Process

In the Board Meeting held on 16 December 2020[15], the SEBI board has taken several decisions, including the following:

i. In relation to companies going through Corporate Insolvency Resolution Process ('CIRP') if the public shareholding falls below 10%, such listed companies are required to bring the same to at least 10% within 18 months and to 25% within 36 months. In this context, the SEBI Board has decided that such companies will be mandated to have at least 5% public shareholding (as against no minimum requirement at present), and the shareholding should go up to 10% within 12 months and to 25% within 36 months;

ii. In relation to applicability of minimum promoters' contribution and subsequent lock in requirements for a further public offer, the proposal is to do away with both, subject to fulfilment of certain conditions, including that the equity shares of the issuer are frequently traded on a Stock Exchange for a period of at least 3 years.

2. SEBI: Single login e-voting facility for demat account holders[16]

At present, there are multiple e-voting service providers ('ESPs') providing e-voting facility to listed entities which necessitates registration on various ESPs and maintenance of multiple user IDs and passwords by shareholders. Further, SEBI observed that the participation by the public non-institutional shareholders / retail shareholders is at negligible level

In the context of the above, SEBI, vide circular dated 9 December 2020, proposed new mechanism to facilitate e-voting to all the demat account holders, by way of a single login credential, through their demat accounts / websites of Depositories / Depository Participants.

Under Phase I, shareholders can directly register with depositories wherein they would be able to access the e-voting page of various ESPs through the websites of the depositories without further authentication by ESPs. Alternatively, demat account holders will have the option of accessing various ESP portals directly from their demat accounts. After this, they would be routed to the webpage of the respective depositories from their demat accounts,

[15] PR No. 61/2020 dated 16 December 2020
[16] SEBI/HO/CFD/CMD/CIR/P/2020/242 dated 9 December 2020

which in turn would enable access to the e-voting portals of various ESPs without further authentication.

Under Phase II, in order to further enhance the convenience and security of the e-voting system, the depository will have to validate the demat account holder through a One Time Password (OTP) verification process.

3. SEBI: Amendments to guidelines for preferential issue and institutional placement of units by a listed InvIT[17]

- SEBI tweaked its framework pertaining to allotment of units by emerging investment vehicle InvIT on a preferential basis.
- The preferential issue of units would not be made to any person who has sold or transferred any units of the issuer during the six months preceding the relevant date.
- Further, where any person belonging to sponsor (s) has sold/ transferred their units of the issuer during the six months preceding the relevant date, the sponsor(s) shall be ineligible for allotment of units on preferential basis.

4. SEBI issues FAQs on Forensic Audit Disclosure[18]

As per SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (as recently amended), in case of initiation of forensic audit, the following disclosures shall be made to the stock exchanges by the listed entities (under sub-clause 17 of Clause A in Schedule III, Part A):

a) The fact of initiation of forensic audit along with the name of entity initiating the audit and reasons for the same, if available;

b) Final forensic audit report (other than for forensic audit initiated by regulatory / enforcement agencies) on receipt by the listed entity along with comments of the management, if any.

In the view of the above backdrop, SEBI has issued the following FAQs:

1) What types of 'forensic audits' are required to be disclosed?

   Forensic audits mentioned in LODR refers to those audits, which are initiated with the objective of detecting any mis-statement in financials, mis-appropriation/ siphoning or diversion of funds. It does not seek to cover disclosure of audit of matters such as product quality control practices, manufacturing practices, recruitment practices, supply chain

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[17] SEBI/HO/DDHS/DDHS/CIR/P/2020/232 dated 17 November 2020
[18] FAQs dated 27 November 2020

process including procurement and matters that would not require any revision to the financial statements disclosed by the listed entity.

2) Whether forensic audits initiated by the company are to be disclosed?

   The fact of initiation of any forensic audit, (or an audit by whatever name called), by the management of listed entity, lenders, regulatory / enforcement agencies for the purpose mentioned at point 1 above, are required to be disclosed.

3) Whether the disclosure applies to ongoing audits?

   The law has prospective effect. Hence, it applies to all audits which are initiated and audit reports which are finalized after 8 October 2020.

4) What details may be expunged from the disclosure of the final forensic audit report?

   In the disclosure of the final forensic audit report, any personally identifiable information including names of individuals and commercially sensitive information, if any, may be expunged.

Katalyst Comments:

While the disclosure of forensic audit is a critical factor, it would be a practical challenge for large listed companies to decide as to which audits undertaken should be disclosed; whilst disclosure and transparency is good as a general concept, the reaction of investors can often be 'disproportionate' and can cause long-term adverse impact.

D. RBI and Foreign Exchange Regulations

1. RBI aligns list of Compoundable contraventions under FEMA with NDI Rules[19]

Compounding of contraventions under the Foreign Exchange Management Act, 1999 (FEMA) is governed by the Foreign Exchange (Compounding Proceedings) Rules, 2000 and the Reserve Bank of India's (RBI) Master Direction on Compounding of Contraventions under FEMA, 1999 dated 1 January, 2016.

Pursuant to the supersession of FEM (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 ('**TISPRO**')and issuance of FEM (Non-Debt Instrument) Rules, 2019 [**'NDI Rules'**] and FEM (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 [**'MPR Regulations'**], RBI has updated the reference of the erstwhile

[19] A.P. (DIR SERIES 2020-21) CIRCULAR NO. 6 dated 17 November 2020

regulations in line with the NDI Rules and MPR Regulations vide RBI Circular No.06 dated 17 November 2020[5] (‘**Nov 2020 Circular**’).

The power to compound contraventions under TISPRO delegated to the Regional Offices/ Sub Offices of the RBI has been aligned with corresponding provisions under NDI Rules and MPR Regulation.

Technical contravention to be compounded with minimal compounding amount

Whenever a contravention is identified by RBI or brought to its notice by the entity involved in contravention by way of a reference other than through the prescribed application for compounding, RBI would classify such contravention under specified heads and deal with them in the manner set out below:

- **Technical/ minor:** By issuing an administrative / cautionary advice;
- **Material:** By requiring compounding of such offences following the compounding procedure;
- **Sensitive/serious:** By referring these contraventions to the Directorate of Enforcement.

However, once a compounding application is filed by the concerned entity suo moto, admitting the contravention, the same will not be considered as ‘technical’ or ‘minor’ in nature and the compounding process shall be initiated in terms of section 15 (1) of Foreign Exchange Management Act, 1999 read with Rule 9 of Foreign Exchange (Compounding Proceedings) Rules, 2000.

In the context of the above, Nov 2020 Circular provides for regularizing all technical / minor contraventions by imposing minimal compounding amount as per the compounding matrix provided in the Compounding Direction.

Katalyst Comments

The amendments introduced by RBI to the Compounding Directions would ease the regulatory process and align the provisions of the Compounding Direction with the current exchange control regime.

2. RBI: Draft Circular on declaration and distribution of Dividend by NBFCs

With a view to ensure financial discipline and transparency, the Reserve Bank of India (RBI) on proposed guidelines for non-banking financial companies (NBFCs) for declaring dividends which is elaborated as below:

1) **Capital Adequacy and Leverage:** NBFCs should comply with the prescribed minimum capital adequacy and leverage ratio as under:
   - **Deposit taking NBFC (NBFC-D) and Systemically Important Non-Deposit taking NBFC (NBFC-ND-SI)** - CRAR of at least 15% for last 3 years, including the year of declaration of dividend.
   - **Non-Systemically Important Non-Deposit taking NBFC (NBFC-ND)** – leverage ratio of less than 7 for last 3 years, including the year of declaration of dividend.
   - **Core investment Company (CIC) -** Adjusted Net Worth (ANW) of at least 30% of aggregate risk weighted assets (RWA) on balance sheet and risk adjusted value of off-balance sheet items for last 3 years, including the year of declaration of dividend.

2) **Non-Performing Assets (NPA):** The net NPA ratio should be less than 6% in each of the last 3 years, including the year of declaration of dividend.

3) **Other Criteria:**
   - NBFC should comply with the provisions of Section 45-IC of RBI Act, 1934, prevailing regulations and guidelines
   - The proposed dividend should be payable out of current year's profit
   - RBI should not have placed any explicit restrictions on NBFC om declaration of dividend.

4) **Other considerations / conditions**

   - If the CRAR/ leverage/ ANW norms are not met as stipulated above in the previous two years, the applicable NBFCs / CICs would be eligible to pay dividend as per Category D as per matrix tabulated above, provided, they have achieved minimum regulatory CRAR/ leverage/ ANW norms and their net NPA is less than 4% in the accounting year for which they propose to declare dividend.
   - Dividend pay-out ratio shall be calculated as a percentage of 'dividend payable in a year' to 'net profit during the year.
   - NBFC-ND may declare dividend subject to a ceiling of 50% on the dividend pay-out ratio, as per the Board approved policy.
   - Type I NBFC shall not be subject to any ceiling on the dividend pay-out.

3. RBI: Establishment of Branch Office / Liaison Office / Project Office in India by foreign law firms[20]

The Hon'ble Supreme Court while adjudicating a case held that advocates enrolled under the Advocates Act, 1961, alone are entitled to practice law in India and that foreign law firms / companies or foreign lawyers cannot practice profession of law in India. Accordingly, AD Category – I banks have been directed not to grant any approval to any branch office, project

[20] A.P. (Dir Series) Circular No. 07 dated 23 November 2020

office, liaison office or other place of business in India under FEMA for the purpose of practicing legal profession in India.

4. RBI Internal Working Group (IWG) Report on Indian Private Sector Banks[21]

The RBI Internal Working Group has made, inter-alia, the following key recommendations in its Report:

- The cap on promoters' stake in the long run (15 years) may be raised from the current level of 15% to 26% of the paid-up voting equity share capital of the Bank. As regards non-promoter shareholding, a uniform cap of 15% of the paid-up voting equity share capital of the Bank may be prescribed for all types of shareholders.

- Well-run large Non-banking Financial Companies (NBFCs), with an asset size of Rs. 50,000 crore and above, including those which are owned by a corporate house, may be considered for conversion into Banks, subject to certain specified conditions.

- For Payments Banks intending to convert to a Small Finance Bank, track record of 3 years of experience as Payments Bank may be considered as sufficient. Further, Small Finance Banks and Payments Banks may be listed within 6 years from the date of reaching the net worth, equivalent to prevalent entry capital requirement prescribed for universal Banks, or 10 years from the date of commencement of operations, whichever is earlier.

- The minimum initial capital requirement for licensing new banks should be enhanced from Rs. 500 crores to Rs. 1000 crore for universal Banks, and from Rs. 200 crores to Rs. 300 crores for small finance banks.

E. Goods and Service Tax Highlights

1. Madras High court ('HC') has admitted writ challenging restriction imposed under Rule 96(10) for claiming of refund

Madras HC[22] admits writ petition filed by an 100% EOU unit, engaged in the design and manufacture of automotive ancillary systems, challenging Rule 96 (10) of the CGST Rules,2017 ('CGST Rules') as amended vide Notification No. 54/2018-CT dated 9 October, 2018. Petitioner submits that section 16 of the IGST Act and section 54 of the CGST Act provides the form and manner of claiming refund but do not restrict the refund. Also, petitioner argued that amended Rule 96(10) has disentitled exporters who do not import inputs under Advance Authorisation ('AA') scheme which was never the intention. Further, petitioner argued that Rule 96(10) creates fetter on an exporter's right to claim refund of IGST paid on exports &

[21] Press Release: 2020-21/667 dated 20 November 2020
[22] Comstar Automotive Technologies Pvt. Ltd. vs. UOI

does not stand the test of legality because the Statute empowers rules to be made for enabling the refund mechanism, but not to restrict refund claims for legitimate exporters.

Katalyst Comments:

It is a good move post ruling by Gujarat HC in case of Cosmo Films Limited wherein HC has upheld the constitutional validity of the Rule 96(10) of CGST Rules as amended by Notification no. 54/2018-CT dated 9 October, 2018 and has given the retrospective effect of denial of refund of tax paid by AA holders w.e.f. 23 October, 2017 and unsettled the law which requires consideration by the Hon'ble Apex court.

2. No GST on sale of flats post issuance of CC, under Joint Development Agreement ('JDA')

Karnataka AAR[23] has held that consideration received by the applicant – land owner towards its share of flats consequent to JDA are not liable to GST only when the entire consideration is received after issuance of completion certificate ('CC'). However, AAR clarifies that if the Applicants (itself or through Developer) sold the units prior to issuance of CC, then the transactions amount to supply of 'Works Contract Service' and liable to GST.

3. The activities of club/society are liable to GST and principle of mutuality is not applicable

The Maharashtra AAAR[24] upheld the AAR and has held that various activities undertaken by society/club such as management, maintenance. administration of the society property etc. are covered under the definition of supply as per section 7 of the CGST Act. The AAR has distinguished applicant reliance on SC judgment of Calcutta club basis which it was contended that a society can't be said to be doing business with its members as both the society and its members are one and the same, owing to the common Principle of Mutuality. Further, the AAAR has observed that the provisions under the CGST law regarding definition of 'person', 'business' and 'supply' are now self-contained, unqualified and wide enough to include the supply by both-incorporated and unincorporated clubs to its members and by their extensiveness completely does away with the principle of mutuality.

4. Madhya Pradesh HC strikes down SCN/Orders for GST liability communicated over email for procedural-deviation

In view of violation of statutory procedure prescribed for communicating show-cause notice/order under Rule 142 (1) of CGST Rules, the Madhya Pradesh HC[25] has stuck down the SCN/order confirming GST liability for F.Y2018-19 and F.Y.2019-20. The HC states that it is trite principle of law that when a particular procedure is prescribed to perform a particular act then all other procedures/modes except the one prescribed are excluded. Rule 142 has

[23] In the matter of Sri. B.R. Sridhar [TS-1000-AAR-2020-NT]
[24] In the matter of Apsara Co-operative Housing Society Ltd. [TS-983-AAAR-2020-NT]
[25] Akash Garg vs. State of M.P. [TS-1050-HC-2020(MP)-NT]

prescribed only mode for communicating the show-cause notice/order is by way of uploading the same on website of the revenue and revenue has failed to provide any material to show that the impugned show-cause notice/order was uploaded on Revenue's website but communicated through an e-mail. In view of this, HC has allowed the petition, granting liberty to revenue to follow the procedure prescribed in Rule 42.

5. Key amendments in CGST Rules, 2017[26]

Series of notifications issued on 10 November 2020 for implementation of newly automated GST Compliance System (w.e.f. 1 January 2020)

- **Rule 60 of CGST Rules:** The details submitted by the supplier in GSTR -1 will be auto-populated in GSTR -2B of the recipient. Details of Input Tax Credit (ITC) will travel from GSTR -2B to GSTR -3B

- **Rule 61A of CGST Rules:**

  i. An option for quarterly filing of GSTR -3B under the scheme of Quarterly Return Monthly Payment inserted

  ii. A registered person shall require to opt the option from the 1st day of the second month of the preceding quarter till the last day of the first month of the quarter i.e. The time limit to opt the scheme from April – June 2021 is from 1 February, 2021 till 30 April, 2021.

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[26] Notification 82/2020-Central Tax dated 10 November 2020