KATALYST ADVISORS

Katalyst Kaleidoscope

December 2022: Tax and Regulatory Insights

SUMMARY OF CONTENTS

A. Income Tax highlights 2

1. Supreme Court: Asset revaluation credited to partners' capital taxable in "otherwise" category of section 45(4) 2
2. Pune ITAT: Successor steps into predecessor's shoes on amalgamation; allows Capital Loss, MAT Credit, and Foreign Tax credit of the predecessor to the Successor 2
3. Mumbai ITAT: Tax neutrality of demerger 3
4. Chennai ITAT: Non-taxability of assets received by an individual from a company pursuant to will/family settlement arrangement 4
5. Mumbai ITAT: Non-taxability of buyback of shares pursuant to the family settlement 4

B. Corporate Law Highlights 5

1. NCLAT : Dispensation of the creditors' meeting 5
2. Mumbai NCLT: Reduction of Share Capital vis-à-vis Buy-Back 6
3. Bengalaru NCLT: Merger cannot be kept in abeyance till the conclusion of the penal / investigation proceedings 6
4. Mumbai NCLT: Real Estate Companies are not subject to RERA Jurisdiction by default 7
5. MCA circular on Registered Valuer Rules 7

C. Securities' Law highlights 7

1. SEBI: Alternate Investment Fund regulations ('AIF') amendments 7
2. SEBI: High-level panel to review Corporate takeover rules 8
3. IFSCA: Report of the expert committee for drafting a legal framework for allowing Variable Capital Companies ('VCC') in the IFSCs 8
4. Structured Digital Database (SDD) – Maintenance of Unpublished Price Sensitive Information (UPSI) 9
5. Operational Aspect of Scheme(s) of Arrangement by entities who have listed their Non-convertible Debt securities (NCDs)/ Non-convertible Redeemable Preference shares (NCRPS) ... 9
6. SEBI Board Meeting: Phase out of Share Buyback via Stock Exchange and amendments to strengthen Market Infrastructure Institutions (MIIs), governance etc. approved........ 10

D. UAE Corporate Tax 10

1. Introduction of UAE Corporate Tax from 1 June 2023 10

E. Goods and Service Tax Highlights 12

1. Delhi HC: Credit entitlement cannot be restricted if payment is not made to the supplier 12
2. Calcutta HC: Use of mens-rea expression not sufficient to establish a wilful attempt to evade payment of tax 12
3. Key recommendations of the 48th GST Council meeting held on December 17, 2022 13

A. Income Tax highlights

1. Supreme Court[1]: Asset revaluation credited to partners' capital taxable in "otherwise" category of section 45(4)

The Supreme Court has held that credit of revalued assets to the partner's capital account shall be construed as a 'transfer' (as per pre-amended Section 45(4) of the Act, prior to the Finance Act, 2021). The Hon'ble Supreme Court has affirmed the Bombay High Court judgement in A.N. Naik Associates[2] wherein the word "otherwise" as used in Section 45(4) of the Act has been analysed in detail i.e., includes not only the cases of dissolution, but also cases of subsisting partners of a partnership, transferring the assets in favor of a retiring partner.

The Hon'ble Supreme Court has held that the credit of the assets' revaluation amount to the capital accounts of the partners can be said to be, in effect, a distribution of the assets to the partners and has accordingly, held that the assets so revalued and the credit into the capital accounts of the respective partners can be said to be 'transfer', under the 'otherwise' category.

Katalyst Comments

This judgment will impact situations (in the pre-amendment scenario) whereby revaluation gains were being credited to the partner's capital accounts, followed by bringing in new partners with a related infusion of capital in the same partnership firm and then subsequently withdrawing the old partner's share to the extent of the capital. However, after the amendment of Section 45(4) and introduction to Section 9B of the Act by Finance Act 2021, this planning avenue has been anyway plugged.

2. Pune ITAT[3]: Successor steps into predecessor's shoes on amalgamation; allows Capital Loss, MAT Credit, and Foreign Tax credit of the predecessor to the Successor

The Pune ITAT has allowed the long-term capital loss of amalgamating company to be carried forward by the amalgamated company even if the condition mentioned in Section 72A of the Act has not been complied with, as provisions of Section 72A of the Act relates only to business loss and unabsorbed depreciation. Since the business of the amalgamating company under amalgamation continues uninterruptedly by the amalgamated company, the benefit of such carry forward and set off earned by the business of the amalgamating company has to be allowed to the successor entity.

The ITAT has reiterated the principle of the Supreme Court in the case of T. Veerabhadrao[4] that the successor becomes entitled to all the entitlements and deductions due to the predecessor. Similarly, in absence of specific prohibition under the Act in case of

---

[1] CIT v Mansukh Dyeing and Printing Mills [2022] 145 taxmann.com 151 (SC) dated November 24, 2022
[2] CIT v A.N. Naik Associates & Anr. (2004) 265 ITR 346 (Bombay)
[3] Capgemini Technology Services India Limited v DCIT ITA No.1857/PUN/201 dated November 30, 2022
[4] CIT v. T. Veerabhadra Rao [1985] 155 ITR 152 (SC)

amalgamation, MAT credit of amalgamating company shall be available to the amalgamated company.

Katalyst Comments

This is an important decision, whereas the Tribunal has enunciated the principle that the amalgamated company being the successor of the amalgamating company is eligible to have to utilise brought forward capital loss of the amalgamating company for the balance period. In other words, the absence of a provision akin to Section 72A of the Act (which only applies to business loss and unabsorbed depreciation) does not affect other tax losses (such as capital loss, house property loss, etc.) by applying the law of succession; this may also help in claiming various deductions in the hands of the amalgamated company by applying the principle of succession.

3. Mumbai ITAT[5]: Tax neutrality of demerger

Pursuant to the composite scheme of arrangement between Grasim, Aditya Birla Nuvo Ltd ('ABNL') and Aditya Birla Capital Limited ('ABCL'), whereas ABNL was merged with Grasim with effect from July 1, 2017, and subsequently Grasim demerged its financial services business into ABCL with effect from July 4, 2017.

The AO was of the view that out of the total assets transferred as a part of the demerger by Grasim to ABCL of Rs. 1,876 Cr, a substantial part was represented by investment in Aditya Birla Finance Ltd. ('ABFL'), accordingly, the demerger was not in compliance with Section 2(19AA), in the sense that this was not an "undertaking". The AO accordingly took the stand that the allotment of shares by ABCL to the shareholders of Grasim as consideration for demerger is deemed dividend.

The Mumbai ITAT, on the facts of the given case, held as under:

- The assets transferred by Grasim pursuant to the demerger was an "undertaking" and was a tax-neutral demerger within the meaning of Section 2(19AA) of the Act;
- The fact that ABNL had not shown the financial services business as a separate business segment was not relevant;
- Although a substantial part of the undertaking was holding 9.77% shares of ABFL, this does not impact the assessee's stand that this was part of the "undertaking"
- There is no distribution of any asset by Grasim to its shareholders and the deemed dividend concept itself excludes the distribution of shares pursuant to a demerger by the resulting company to its shareholders.

Incidentally, although it was ultimately not relevant, the Mumbai NCLT also held that the fact that the scheme of arrangement is approved by the NCLT does not prevent the tax department in reviewing the scheme from a tax perspective.

[5] Grasim Industries v DCIT ITA No. 1935/MUM/2020& SA NO 135/M/2021

Katalyst comments

The issue of tax neutrality of a demerger has been a contentious issue; the definition of "demerger" from a tax neutrality standpoint under the Income Tax Act is unfortunately riddled with several conditions and one of the key issues is the definition of "undertaking". Holding shares in a related business should be part of an "undertaking" and it is important for the CBDT to issue a circular to clarify this aspect, in the absence of which this becomes a significant deterrent to genuine corporate restructuring.

4. Chennai ITAT[6]: Non-taxability of assets received by an individual from a company pursuant to will/family settlement arrangement

In the facts of the given case, the land was held by a family-owned company whereby the assessee's father held a 95% stake in the Company. Pursuant to the death of the assessee's father and as per his will, the land that was held by the company was transferred to the assessee at a value lower than the stamp duty reckoner value. The ITAT basis same judicial precedents[7] held that the corporate veil can be lifted, so as to prevent injustice, and thereby company can be a part of the family settlement arrangement/will in order to settle the asset among the family members. Hence, the transfer of such land from the company pursuant to a family settlement arrangement has been held not taxable in the hands of the recipient as the aforesaid land is received under a will which is specifically exempt under Section 56(2)(vii) of the Act.

Katalyst comments

This is an interesting decision by Chennai ITAT in the context of family arrangement, wherein it has been held that the corporate veil can be pierced in order to give effect to a family arrangement.

5. Mumbai ITAT[8]: Non-taxability of buyback of shares pursuant to the family settlement

In the given case, there were some disputes between the promoter family which affected the functioning of the company and its group companies. The matter was referred to Company Law Board ('CLB'). Based on the direction of the CLB, a family settlement arrangement was reached, whereby the assessee offered the shares in the buyback process of the company such that shares of other family members have been increased.

The ITAT, relying on judicial precedents, has held that the aforesaid transfer of shares pursuant to a family settlement arrangement is in order to restore peace and harmony in the family members and is not subject to capital gains tax. The transfer of shares to family members can be made through any mode (i.e. sale of shares, buyback of shares, etc.)

[6] ACIT v Anitha Kumaran 1164/Chny/2019 dated September 7, 2022
[7] Shaw Wallace & Co. Ltd. v CIT (Cal) (119 ITR 399) and SKM Shree Shivkumar vs. ACIT in ITA No.2278/Mds/2012 & 1965/Mds/2011
[8] Sujan Azad Parikh v DCIT 186/Mum/2021 dated July 13, 2022

Katalyst comments

This is once again a favorable decision on the non-taxability of transfer of assets pursuant to a family settlement arrangement. The ITAT further held that the mode of transfer in a family settlement arrangement is irrelevant. This decision is before the buyback tax era and hence, capital gains tax was taxable in the hands of the shareholder (which is now exempt in the hands of the shareholders). However, the principle of non-applicability of capital gains tax on family settlement arrangements as stated above is still relevant.

B. Corporate Law Highlights

1. NCLAT[9] [10]: Dispensation of the creditors' meeting

The issue of dispensation or otherwise of creditors meetings has come up in 2 recent matters before the NCLAT, and there have been two different views taken by the NCLAT albeit on somewhat different facts.

In the application for approving the scheme of amalgamation before the NCLT, the transferor company had prayed for dispensation of the meeting of the secured creditors on the ground that the secured creditors would not be impacted by the proposed scheme of amalgamation since the assets of the appellant, post amalgamation, would be enhanced and far more than the liabilities. Also, there is no compromise arrangement with the creditors u/s 230(1)(a) of the Companies Act, 2013. However, the NCLT while dispensing with the meeting with the secured creditors directed the appellant to obtain NOC from secured creditors before the final date of the hearing, this issue was challenged before NCLAT.

The appellant submitted that the NCLT ignored the legal position that, where net-worth of both companies is positive, unsecured creditors are paid in the course of ongoing business, the scheme is not prejudicial to their interest, and their liability is not proposed to be reduced, then there should be no requirement of NOC of creditors. The NCLAT held that there was no requirement to obtain a NOC, but the secured creditor is directed to raise the objection, if any, to the scheme within 30 days of the notice of amalgamation before NCLT, failing which, will be presumed that the said secured creditor has no objection to the amalgamation.

However, there is a seemingly contradictory decision of NCLAT in the case of Vedanta Ltd wherein it has been held that even if there is an arrangement between the company and its members, the Company is required to obtain consent from 90% of its creditors in value, or obtain approval of a majority of creditors representing 75% in value through a creditors meeting, as the aforesaid arrangement may indirectly affect the creditors.

The NCLAT order is based on several grounds of reasoning, including that (a) the SEBI circular of February 1, 2022, requires a NOC from not less than 75% of secured creditors in value and

---

[9] Lasa Supergenerics Ltd v Harishree Aromatics & Chemicals Pvt. Ltd, Company Appeal. (AT) No.82 /2021, NCLAT, New Delhi dated November 28, 2022

[10] Vedanta Ltd v RoC Company Appeal (AT) No. 181-182 of 2022 dated December 9, 2022

(b) requires to obtain consent from 90% of its creditors in value but the core of the reasoning is based on the wordings of Section 230(9) which provides that the NCLT may dispense with calling a meeting of creditors or class of creditors where such creditors/class of creditors (at least 90% in value) agree to the scheme of arrangement.

Katalyst Comments

These 2 orders, whilst based on the facts of each case, appear to be contradictory to one another and it would be helpful if the MCA issued a circular or some guidelines to clarify this issue.

2. Mumbai NCLT[11]: Reduction of Share Capital vis-à-vis Buy-Back

Mumbai NCLT approved a petition seeking approval of the reduction of the share capital of the Petitioner Company in terms of a special resolution which was unanimously approved by the shareholders. However, the Regional Director had objected that the proposed scheme was in nature of a buy-back, and therefore the Petitioner Company be directed to place on record as to how the Scheme was not to circumvent the provisions of Section 68 (Buyback).

The company contended that as per Section 66(1)(b)(ii) of the Companies Act, 2013, it could with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of its wants, as the objective of both the provisions is to provide an option to the shareholders and it is a well-settled position of law that a company has the freedom to choose the procedure laid down in the law as it deems fit. The NCLT had approved the petition for capital reduction.

Katalyst Comments

The provision for capital reduction as per Section 66 of the Companies Act, 2013 is wider than the provision for the buyback of shares as per Section 68 of the Companies Act, 2013 and hence, the company is at liberty to reduce its share capital in any manner under Section 66 of the Companies Act, 2013.

3. Bengalaru NCLT[12]: Merger cannot be kept in abeyance till the conclusion of the penal / investigation proceedings

Bengaluru NCLT has held in a recent order that a merger cannot be kept in abeyance till the conclusion of penal / investigation proceedings if the Transferee Company undertakes to fully co-operate with authorities in respect of the said investigation proceedings.

---

[11] Waacox Energy Private Limited CP/198/MB-IV/2021 dated November 10, 2022
[12] Mindtree Limited and Larsen & Toubro Infotech Limited, CP(CAA)No.41/BB/2022 dated November 4, 2022

4. Mumbai NCLT[13]: Real Estate Companies are not subject to RERA Jurisdiction by default

Mumbai NCLT has held that, if no ongoing projects are required to be registered under Real Estate (Regulation and Development) Act, 2016 (RERA), such Companies are not subject to RERA Jurisdictions in order to obtain NOC from RERA for the purpose of Composite Scheme of Amalgamation.

5. MCA circular on Registered Valuer Rules[14]

The Ministry of Corporate Affairs has amended the Registered Valuers Rules which states that a partnership firm or company shall not be eligible to be a registered valuer if:

- it is not a member of a registered valuers organisation
- it shall not be a member of more than one such organisation at a given point in time.

A transition period of 6 months has been provided for existing organizations along with procedural requirements for the temporary surrender of membership if a person is not resident in India or takes up employment.

C. Securities' Law highlights

1. SEBI[15]: Alternate Investment Fund regulations ('AIF') amendments

In the SEBI board meeting held on September 30, 2022, there were proposals in relation to amendments to the AIF regulations and the 4th amendment regulations and the circular is a culmination of those proposals. The key aspects are as under:

- As this is the situation in several jurisdictions, the regulations now require the investment manager and the trustee/structure equivalent, to ensure that the assets and liabilities of each scheme of an AIF are ring-fenced.
- The first close of an AIF scheme shall be declared within 12 months from the date on which communication is done to SEBI for taking the private placement memorandum on record; for open-ended schemes of Category III AIF, the first close shall be declared within 12 months from the close of the IPO.
- An investor shall be given the option of withdrawing or reducing capital commitment to the scheme prior to the declaration of the first close.
- In case of change in control, the regulation now requires prior approval from SEBI, as against the earlier requirement of only notifying SEBI of such change.

---

[13] Shri Rangji Realties Private Limited with Capri Global Advisory Services Private Limited & Ors. CP(CAA)/179/MB/2022

[14] MCA Notification G.S.R. 831(E) dated November 21,2022

[15] SEBI (AIF) (Fourth Amendment Regulation) dated November 15, 2022

2. SEBI: High-level panel to review Corporate takeover rules

- SEBI has formed a high-level panel to review corporate takeover rules, the first such anticipated in more than a decade as Asia's third biggest economy seeks to establish a contemporary M&A regime that bakes in momentous changes spawned by the Global Financial crisis and the emergence of new buyout mode undergirded by private-equity financing.
- The 20-member committee will be headed by the Former Chief justice of Punjab and Haryana High Court Shiavax Jal Vazifdar.

3. IFSCA: Report of the expert committee for drafting a legal framework for allowing Variable Capital Companies ('VCC') in the IFSCs

The IFSCA Act, 2019 provides for the establishment of a unified statutory regulatory, namely IFSCA, for the development of financial products and financial services in IFSCA India. The preface to the report brings out that financial markets enable direct channelization of funds from suppliers to users through a variety of processes like the public issue of securities. Alternatively, a variety of fund management structures step into the shores of suppliers of funds. In this context, and with intense competition in various jurisdictions, IFSCs have witnessed the emergence of VCC structure in the space of fund activity and a few jurisdictions have come up with supporting legal frameworks and offer incentives to promote VCCs.

The IFSCA had set up an expert committee under the Chairmanship of Dr. K P Krishnan in September 2022 to examine the feasibility of the VCC structure in India; the Krishnan committee recommended the VCC regime as a step in the right direction to develop IFSCs in India in terms of its report submitted in May 2021.

On consideration of the report of the Krishnan committee, IFSC set up an expert committee under the Chairmanship of Mr. M S Sahoo (former whole-time member of SEBI and former Chairman of the Insolvency and Bankruptcy Board of India) to draft a legal framework for allowing the VCC structure to operate in India and this expert committee report dated October 12, 2022, has now been released; the committee has proposed a legal framework within IFSCA.

The committee has broadly agreed with the approach of the Krishnan committee and has come up with a draft seeking to amend the IFSCA Act, 2019 to accommodate the VCC structure within the IFSCA.

4. Structured Digital Database (SDD)[16] – Maintenance of Unpublished Price Sensitive Information (UPSI)

Stock exchanges have required companies to submit SDD quarterly compliance certificates. Further, Exchanges can inspect the SDD system after providing one working day's notice, on inspection, if there is non-compliance, appropriate action shall be initiated.

NSE has now intimated that, if a company has not complied with Regulations 3(5) and 3(6) of the Insider Trading Regulations (PIT), which govern SDD maintenance by companies, then Exchanges shall initiate the following action: Under the **'Get Quote'** page of the Exchange Website of the Listed Entity, wherever listed, would display that the company is non-compliant with SDD, from the next trading day till the Exchanges have satisfactorily verified that the company is in compliance.

5. Operational Aspect of Scheme(s) of Arrangement by entities who have listed their Non-convertible Debt securities (NCDs)/ Non-convertible Redeemable Preference shares (NCRPS)

Newly inserted Regulations 59A & 94A of the LODR provide that an entity that has listed Non-convertible Debt securities (NCDs) / Non-convertible Redeemable Preference Shares (NCRPS) and which intends to undertake a scheme of arrangement (Scheme) or is involved in a Scheme shall file the draft Scheme with Stock Exchange(s) for obtaining the No-Objection Letter, before filing such Scheme with any court or Tribunal.

SEBI vide its Circular[17] has now laid down the operational aspects in relation to the submission of detailed documents to the Stock Exchange which inter-alia includes:

- Submission of documents (such as Draft Scheme, Valuation Report, Fairness Opinion Report, Auditor Certificate, Compliance Report, NOC from Debenture Trustee, declaration, complaint report, etc) while obtaining approval from SEBI.
- Certain specified information to be specifically covered in the Scheme (which inter-alia includes Credit rating, dividend/ coupon, tenure, maturity, put or call options, terms of the instrument, etc)
- Information in relation to the abridged prospectus (if the scheme involves an unlisted entity) and pre and post-arrangement expected debt structure to be incorporated in the notice and explanatory statement.
- Unlisted entities can be merged with a listed entity only if the listed entity is listed on a Stock Exchange having nationwide trading terminals.
- The circular also provides operational guidelines to be followed post-sanctioning the Scheme by NCLT.

[16] NSE Circular Ref No: NSE/CML/2022/52 dated November 4, 2022
[17] SEBI/HO/DDHS/DDHS-RACPOD1/P/CIR/2022/156 dated November 17, 2022

Further, SEBI vide its Circular[18] has further subsequently clarified that the provisions of the aforesaid circular shall not apply to a Scheme of Arrangement which provides for an arrangement between a debt-listed entity and its unlisted wholly-owned subsidiary. However, such debt-listed entity shall file the draft Scheme of Arrangement with Stock Exchange(s) for the purpose of disclosure and the Stock Exchange(s) shall disseminate the scheme documents on their websites.

6. SEBI Board Meeting[19]: Phase out of Share Buyback via Stock Exchange and amendments to strengthen Market Infrastructure Institutions (MIIs) governance etc. approved

SEBI has approved various amendments and the gist is as follows:

- Buyback through stock exchange route will be phased out in a gradual manner and a separate window will be created on Stock Exchange for buyback till the time the buyback through Stock Exchange is permitted; there will be a glide path, at the end of which only buyback through tender offer will be permitted.
- In relation to MIIs (Stock Exchanges, Clearing Corporations and Depositories), SEBI has taken certain key decisions including categorisation of the functions of MIIs into 3 verticals namely critical operations, regulatory, compliance and risk management, and other functions; higher priority should be given to the first two verticals, in terms of resource allocation, as compared to the third vertical. Some provisions regarding further accountability of key management personnel will be introduced and the process of appointment of Public Interest Directors (PIDs) shall be rationalised by mapping certain skill sets/expertise to PIDs.
- Amongst other changes, there will be enhanced risk management framework for Stock brokers designated as "Qualified stock brokers", the on boarding process for registration of Foreign Portfolio Investors will be streamlined and the stock exchanges shall introduce an investor risk reduction access platform in case of disruption of trading services provided by a stock broker.

D. UAE Corporate Tax

1. Introduction of UAE Corporate Tax from 1 June 2023

In order to cement UAE's position as a leading global hub for business and investment and reaffirm its commitment for meeting international standards for tax transparency and preventing harmful tax practices, Corporate Tax Law[20] has been introduced by UAE on December 9, 2022. The key highlights are as under:

[18] SEBI/HO/DDHS/DDHS-RACPOD1/P/CIR/2022/170 dated December 9, 2022
[19] SEBI Board Meeting of December 20, 2022
[20] Federal Decree Law No (47) of 2022

- **Applicability of Corporate Tax (CT)**

  All business and individual carrying on business through a commercial license in UAE including to free zone businesses (subject to existing exemptions), banking business, construction, real estate management, development agency, broking, non-residents carrying on business through Permanent Establishment in UAE.

- **Taxation based on residency**

  In line with the tax regimes of most countries, a "Resident Person" is taxed on income derived from both domestic and foreign sources (i.e., a residence basis), and a "Non-Resident Person" will be taxed only on income attributable to Permanent Establishment or having nexus in the UAE or from sources within the UAE (i.e. a source basis).

- **Tax Rate**

  Taxable Income upto an amount as prescribed by a Ministerial Decision (expected to be AED 375,000 based on the FAQs) – 0%; Taxable Income above the prescribed limit – 9%.

- **Major Exemptions**
  - Extraction of natural resources which is generally subject to Emirate-level corporate tax, Government entity unless conducting business activity issued by licensing authority or entities controlled by them unless conducting a non-mandated activity, certain qualifying public benefit entities, qualifying investment funds, and wholly owned subsidiaries of entities which assist in carrying out the activity of the aforesaid holding companies.
  - For Individuals: Resident Individuals will be subject to corporate tax **only** on the income earned from business activities undertaken in the UAE. Hence, other income is not subject to tax in the hands of resident individuals
  - Foreign Branch/PE of resident: Income of resident from branch/ PE in a foreign country which is subject to at least 9% tax.
  - Reorganisation: Gains or losses from reorganizations or intragroup transfer of assets and/or liabilities subject to certain conditions
  - Operation or leasing of aircraft and ships: Income from the operation or leasing of aircraft and ships in international transportation by non-resident
  - Dividend: Dividend income and other profit distributions from a resident person
  - Participation Exemption: The participation exemption exempts certain income (such as dividends, capital gains) received from entities from UAE Corporate Tax if the shareholder holds at least 5% interest in an entity that is subject to at least 9% tax for 12 months period subject to other anti-avoidance conditions.

- **Tax Loss Relief**

  Businesses will be able to carry forward tax losses indefinitely, subject to certain conditions. These losses can be used to offset up to 75% of the taxable income of future tax periods. Losses incurred before the effective date of CT will not be eligible for relief.

- **Other features**

Group taxation can opt for entities incorporated in UAE, option to elect for small business relief based on revenue threshold, disallowance of net interest over 30% of EBITDA, GAAR, transfer pricing provision, Family foundation to be treated as an unincorporated partnership subject to certain conditions.

Katalyst comments:

Given the Overseas Investment Regulations and the attraction of diversifying investments other than India, many Indian families have been considering setting up an overseas presence in countries, such as Singapore or Dubai. Additionally, many operating companies set up free zone companies in Dubai given its connectivity, Ease of doing business, and proximity to Europe. In all such cases, the implications of the federal tax regime will need to be considered.

E. Goods and Service Tax Highlights

1. Delhi HC[21]: Credit entitlement cannot be restricted if payment is not made to the supplier

The assessee's Electronic Credit Ledger (ECrL) was blocked for more than a year for non-payment to the supplier. In this regard, the Delhi High Court directed revenue to unblock the assessee's ECrL and held that the power under section 86A (1) of the CGST Act allowing blocking of ITC of the assessee for 1 year can be exercised when there are allegations of fraudulent credit availed by the assessee. Also, the restrictions imposed under Rule 86A cannot extend beyond one year, hence, in absence of fraudulent credit availment, the ECrL of the assessee should not be blocked.

Katalyst comments:

This is a welcome judgement by the Delhi High Court, it is pertinent to note that section 16(2) of the CGST Act provides that if payment to the supplier is not made beyond 180 days from the date of invoice, ITC should be reversed and can be availed again once payment is made. Section 86A (1) relating to the blocking of ECrL should not be exercised by the GST authority in absence of any fraudulent ITC availment by the assessee.

2. Calcutta HC[22]: Use of mens-rea expression not sufficient to establish a wilful attempt to evade payment of tax

The assessee sold goods through a single invoice and such goods were transported through 3 trucks. Out of 3 trucks, 2 trucks could not reach to the destination within the time prescribed in the e-way bill, and hence, tax along with penalty was demanded by the GST authority. In this regard, the Calcutta High Court has held that the mere use of the expression mens-rea in the order is not sufficient to establish a wilful attempt to evade payment of tax by the assessee. The order does not provide any reason as to how and in what manner mens-rea was

[21] Sunny Jain vs UOI & Ors. (TS-659-HC(DEL)-2022-GST) dated December 5, 2022
[22] Medha Servo Drives Pvt Ltd & Anr vs. The Assistant Commissioner of State Tax (TS-632-HC(CAL)-2022-GST) dated November 17, 2022

established. Hence, the HC has remanded the matter back to the Appellate Authority for fresh consideration.

Katalyst comments:

In order to levy a penalty, mens-rea or evil mind should be proved by the GST authority. It is unfair to levy a penalty merely because the trucks could not reach to the destination within the stipulated time provided in the e-way bill.

3. Key recommendations of the 48th GST Council meeting held on December 17, 2022

The following are the key recommendation of the 48th GST council meetings:

a. No GST on residential dwellings for personal use
   It is decided to clarify that no GST is payable in case of renting of a residential dwelling to a registered person if it is rented in his/her personal capacity for use as his/her own residence and on his own account and not on account of his business.

b. Proportionate ITC reversal in case of non-payment to supplier
   The council recommended that in case of non-payment to supplier beyond 180 days from date of invoice, only proportionate ITC (i.e., proportionate to the amount not paid to the supplier vis a vis the value of the supply) should be reversed and a new Rule 37A to be introduced to prescribe mechanism of ITC reversal in case of non-payment of GST by a supplier by a specified date and its re-availment, upon payment by the supplier.

c. Decriminalization of GST Law
   The Council has recommended:

   - To raise the minimum threshold of tax amount for launching prosecution under GST from INR 1 Crore to INR 2 Crores, except for the offence of issuance of invoices without a supply of goods or services or both.
   - To reduce the compounding amount from the present range of 50% to 150% of the tax amount to the range of 25% to 100%.
   - To decriminalize certain offences, viz.- obstruction or preventing any officer in the discharge of his duties; deliberate tempering of material evidence; failure to supply the information.

d. Other procedural amendments
   Circulars are to be issued for the following:

   - Procedure for verification of input tax credit in cases involving a difference in ITC availed in FORM GSTR-3B vis a vis that available as per FORM GSTR-2A during FY 2017-18 and 2018-19.
   - The GST Law is to be amended to restrict the filing of returns/ statements (GSTR-1, Form GSTR-3B, Form GSTR-9, and 9C, and Form GSTR-8) to a maximum period of three years from the due date of filing of the relevant return/statement.

e. Appeal withdrawal up to a specified stage
   It is recommended to insert a new rule 109C of the CGST Rules and new Form GST APL-01 or 03 to provide the facility to withdraw appeals up to a specified stage

Katalyst comments:

Some of the measures such as decriminalization of GST Law, retrospective non-taxability of some supplies, GST rate rationalization, facility of appeal withdrawal, proportionate ITC reversal to the extent of non-payment to vendors, etc., will support the business and reduce ambiguity. However, the GST Council has deferred its decision regarding the constitution of GST Appellate Tribunals, GST on online gaming, and other rate rationalisations.

****

Our Offices:

Mumbai
71/75 Mittal Tower,
7th Floor, C Wing,
Nariman Point,
Mumbai - 400021
Tel: +91 22 4917 1616

Pune
#406-408,
Global Square, Near Bund Garden,
Yerwada, Pune- 411006
Tel: +91 20 4840 7700