KATALYST
ADVISORS LLP

Katalyst Kaleidoscope

February 2021: Tax and Regulatory Insights

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A. Income Tax Highlights

1. Hyderabad ITAT: 'Concessionaire rights' eligible for claiming depreciation as intangible asset

Godhra Expressways Private Ltd[1] (assessee) had entered into a concessionaire agreement with the National Highway Authority of India ['NHAI'] on build, operate and transfer 'BOT' basis. It thereafter incurred the expenditure on the corresponding road project(s) and raised the impugned identical depreciation deduction claim. The Income tax authorities relied on the CBDT's Circular[2] on treatment of expenditure incurred in Build-Own-Transfer (BOT) agreements and contended that the cost of the expenditure incurred on the road/highways project is to be amortized over the complete duration of the agreement only and assessee is neither the owner of the road project, nor acquired any commercial or business rights for its exclusive usage to claim depreciation.

The ITAT observed that concession agreement has resulted in the NHAI granting concessionary rights to reconstruct, operate and maintain the corresponding national highway project and upheld the assessee's stand qua its claim that it has been holding the concessionaire rights in the nature of license to collect road toll of an intangible asset under section 32(1) and that it would be entitled to depreciation thereon. The Tribunal held that "we see no material on record which would indicate that anybody other than the assessee is entitled to dilute its rights to construct, operate the project in lieu of the toll collections right for the specified agreement period and the assessee's right to collect toll would form an exclusive right in the nature of license eligible to be treated as an intangible asset". The Tribunal further distinguished Bombay HC ruling in North Karnataka Expressways Ltd.[3] which followed SC ruling in Mysore Minerals Ltd.[4] as it dealt with assessee's self-proclaimed beneficial ownership on the concerned road project.

Katalyst Comments:

The Union Budget 2021-2022 has sought to introduce a provision to disallow depreciation of goodwill with effect from FY March 31, 2021. This applies to "plain vanilla" goodwill and not to other intangible assets such as the one dealt with in the above Tribunal decision.

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[1] TS-65-ITAT-2021(HYD)
[2] Circular No.9/2014 dated April 23, 2014
[3] North Karnataka Expressway Ltd. Vs. CIT10(2015) 272 ITR 145 (Bom)
[4] TS-18-SC-1999-O

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2. Chennai ITAT: Compensation for pre-closure of contract manufacturing agreement is a capital receipt and not non-compete fees and therefore not taxable under section 28(va)(a)

The Chennai ITAT in the case of Sai Mirra Innopharm Private Limited[5] held that compensation received by assessee from Dr. Reddy's Laboratories Ltd. on pre-closure of contract manufacturing agreement constitutes a capital receipt.

The facts were that the assessee had entered into a contract manufacturing agreement with Dr. Reddy's Laboratories Ltd. for manufacturing of drugs as per the specification provided by the principals, but the know-how required for manufacturing of drugs was not possessed by the assessee. Subsequently, Dr. Reddy's terminated the contract before completion of the 10 years' contract period and made a compensation payment to the assessee. The assessee treated the compensation as Capital Receipt, whereas the Income Tax Authorities considered the said receipt to be in the nature of non-compete fee and taxed the compensation under section 28(va)(a).

The Tribunal observed that due to the termination of contract, the assessee company has incurred huge loss in the form of investments made for manufacturing facilities as well as loss of profit from the business for which Dr. Reddy's Laboratories Ltd. had compensated the assessee for such loss. It stated that, "when the assessee is not having necessary know-how for manufacturing of drugs, the amount paid for termination of contract cannot be brought to tax as non-compete fee for not using any know-how, patent, copyright."

Further, the Tribunal held that compensation is for loss of source of income and for relinquishing his right to file law suit for breach of contract. The Tribunal relied on Bombay HC ruling in Parle Soft Drinks (Bangalore) P.Ltd. (now affirmed by SC[6]) and concluded that "compensation received for termination of manufacturing agreement is in the nature of capital receipt for loss of investment in business or loss of profit from business".

Katalyst Comments:

By virtue of Finance Act, 2018, any compensation received on or after April 1, 2019 for termination or the modification of the terms and conditions of any agreement relating to business will be taxable as business income under section 28(ii)(e). However, one can rely on the above-mentioned ruling on fact to fact basis for the compensation received before April 1, 2019.

[5] TS-64-ITAT-2021(CHNY)
[6] TS-5420-SC-2018-O

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3. Karnataka HC: Stamp duty valuation under section 50C does not apply to the sale of 'rights in land'

Hon'ble Karnataka HC in the case of V. S. Chandrashekar[7] reversed order of the Tribunal and held that stamp duty valuation under section 50C not applicable to sale of 'rights or interests in land';

The facts of the case were that the assessee was an Individual running a proprietary concern and had entered into an unregistered agreement with M/s Namaste Exports Ltd for purchase of land. The assessee paid 80% of the consideration, but neither the possession of the land nor a Power of Attorney was executed in favour of assessee. Later on, the land was sold by Namaste Exports Ltd. with assessee's consent. Assessee was mere a consenting witness to the transaction, the Income tax officer had invoked section 50C with respect to sale of land and computed capital gains in the hands of the assessee.

The Karnataka HC noted that section 50C uses the word 'land' instead of the term 'immovable property'. Further it remarked that wherever the legislature intended to expand the meaning of land to include rights/ interests in land, it had included it specifically in sections such as in section 35(1)(a), section 54G(1), section 54GA(1) and section 269UA(d).

The Tribunal further clarified that "section 50C applies only in case of a transferor of land which in the instant case is M/s Namaste Exports and not the assessee who was only a consenting party and not a transferor / co-owner of the property." However, it remitted the matter back to the Tribunal to decide afresh on issue of chargeability of income from sale of rights in land as 'business income' or 'capital gains'.

<u>Katalyst Comments:</u>

*Section 2(47) read with section 269UA of the Income tax act defines **'Immovable Property'.** The definition of Immovable Property includes 'Land and Buildings' as well as 'any rights or interests attached to such land and buildings' while section 50C uses words **'capital asset, being land or building or both'** and not 'Immovable Property'. Hence, section 50C is not applicable to transfer of rights in Land and building.*

[7] TS-73-HC-2021(KAR)

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4. Chandigarh ITAT: The letter of intent (LOI) is only a right to possess plot of land and not land itself; stamp duty valuation under section 50C not applicable on transfer of LOI

Raminder Singh[8] (assessee) had purchased land in AY 2005-06, which was compulsorily acquired by GMADA. In lieu of this acquisition, the assessee was allotted three residential plots in Mohali by way of a letter of intent (LOI). During the AY 2015-16, assessee offered capital gains on transfer of LOI in respect of those three residential plots. The Income Tax Authorities taxed the transfer as capital gain after applying stamp duty valuation under section 50C.

The Tribunal held that “Two major and relevant takeaways from section 50C are that it is a deeming provision and applicable to transfer of land and /or building. Being a deeming provision, it is settled law, it can be applied only in the situation specifically given and cannot go beyond the explicit mandate of the section. What is to be adjudicated therefore is whether LOI qualifies as Land and/or Building in terms of the said section.”

The Tribunal perused the contents of LOI and observed that the compensation for land acquired is by way of “developed” residential/commercial land. Further, The Tribunal stated that “the LOI’s did not confer ownership of specific developed plot of land. They only state allotment of area of residential plot without mentioning specific plot number. The specific allotment is to be done by draw of lots as stated in the land pooling policy of the government. The LOI’s therefore confer only a right to own developed land of specific area, to be developed and also to be identified at a future point in time, they do not confer owner ship of specific land in present. Strictly speaking therefore LOI’s cannot be equated with land.” Therefore, the Tribunal concluded that LOI is only a right to possess plot of land and not land itself and therefore the provisions of section 50C are inapplicable to the present case.

5. Mumbai ITAT: Compensation received upon cancellation of Letter of Intent is assessable as 'capital gains,' and not ‘Income from other sources’

Mumbai ITAT in the case of Shri Shailendra Bhandari[9] allowed assessee's claim of long term capital loss of Rs. 3.37 cr made on cancellation of a booked flat by accepting assessee's treatment of the compensation received from builder on cancellation of LOI as a part of the sale consideration.

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[8] TS-55-ITAT-2021(CHANDI)
[9] TS-45-ITAT-2021(Mum)

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The assessee had entered into an agreement through a LOI with a builder-company by depositing a sum for acquiring shares in the company which would enable him to occupy/ possess the flat upon construction. Subsequently, the LOI was cancelled as the builder did not obtain permits for construction and the assessee received refund of the deposit as well as compensation for an opportunity lost. The assessee treated the difference between the indexed cost of acquisition and the aggregate of refund and compensation as capital loss of Rs. 3.37 cr. The Income Tax Authorities rejected assessee's stand and treated the compensation amount as Income from Other Sources.

The assessee contended before the Tribunal that the agreement with which the flats were booked created a right in favour of the assessee in the immovable property and which upon cancellation would entitle the assessee to receive compensation along with the money already paid as deposits, for surrender of that rights in immovable property. The Income Tax Authorities on the other hand, contended that LOI cannot be said to be an agreement as the provisions of Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (MOFA) was not followed by the assessee.

The Tribunal observed that LOI executed by the assessee was as good as agreement to sell in all respects and held that it created a right in favour of the assessee so far as the property mentioned. The Tribunal further held that provisions of MOFA cannot regulate the taxability of any income which may arise from cancellation of any LOI which is not registered and relying on Bombay HC ruling in Vijay Flexible Containers[10], and co-ordinate bench ruling in Ashwin S. Bhalekar[11] held that right to obtain conveyance of immovable property fell within the expression 'property of any kind' and relinquishment of right in the property amounting to transfer of property.

6. Bangalore ITAT: Income from sale of foreign subsidiaries' shares is taxable as LTCG if shown as Investment and assessee is not in the business of trading in securities

The Bangalore ITAT in the case of United Spirits Limited[12] upheld CIT(A)'s order regarding treatment of income from sale of shares as LTCG and not business income in assessee's hands. The assessee company had sold certain shares held in its subsidiary which were incorporated in British Virgin Islands, disclosed as investment in the financial statements of the assessee and the purpose of the assessee's business was not trading in shares.

[10] [TS-3-HC-1989(BOM)]
[11] [TS-303-ITAT-2019(Mum)]
[12] TS-68-ITAT-2021(Bang)

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The assessee contended that the purpose of setting up of the subsidiary was to consolidate its investment in various operating companies and not to trade in the shares of subsidiary. The Income Tax Authorities contended that the transfer price of shares exceeded the cost price and treated the income from sale of such shares as business income.

Karnataka ITAT had rejected Income tax authorities contention and while citing CBDT Circular No. 4/2007[13] held that no single test is conclusive and it is the cumulative effect of all relevant factors which will be taken into consideration in reaching a conclusion as regards the nature of share. The Tribunal also referred to Circular No.6/2016[14] wherein emphasis is given on treatment done by the assessee in the books for determining treatment of income from sale of shares. The admitted position with regard to treatment in the books of accounts is that the shares have been treated as investment and not as stock-in-trade. In the light of the facts of the cases and circulars mentioned, it was held that the income on sale of shares has to be regarded as LTCG.

7. Delhi ITAT: The assessee-company's claim of Rs. 108.75 Cr as short-term capital loss (STCL) arising from the forfeiture of money paid against share warrants allowed

Azalea International Pvt Ltd[15] ('assessee company') filed its return of income for subject AY declaring a short term capital loss of Rs. 108.75 Cr arising from upfront amount for part payment against Rs. 15 Cr warrants of Indiabulls Power Limited. The assessee company explained that the company conveyed its unwillingness to the Indiabulls Power Limited to exercise the warrants. Consequently, the upfront amount of Rs. 108.75 Crores paid by the company towards part payment against the said warrants was forfeited and the same was charged to the statement of profit and loss account as loss on share warrants. Thus, the above capital loss was claimed.

The Income Tax Authorities held that the assessee company was a conduit for transfer of the amount to the credit in the books of Indiabulls Power Limited as a capital receipt. Accordingly, he held that it is a colourable device created to camouflage the credit of the amount to Indiabulls Power Limited as a capital receipt to avoid the application of section 68 and disallowed the STCL claimed.

The Delhi ITAT acknowledged the Income Tax Authorities' contention that the whole scheme was created for transferring a sum of Rs. 304.50 crores to Indiabulls Power by transferring it

[13] CBDT Circular No. 4/2007 dated June 15, 2007
[14] Circular No.6/2016 dated February 29, 2016
[15] [TS-69-ITAT-2021(DEL)]

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from another company without any tax consequence for which the assessee company was one of the layers used by the Indiabulls Group. The Tribunal stated that 'as far as the scheme of things goes, it is evident for everybody. Nothing is further required to be mentioned that who is the beneficiary and who is the conduit. However, it is not the assessee company who is to be taxed in its hands, as the real beneficiary is Indiabulls Power Limited, which further went into restructuring and scheme of amalgamations.'

The Tribunal relying on Delhi HC ruling in Chand Ratan Bagri (supra), held that forfeiture of the convertible warrant had resulted in extinguishment of the right of the assessee and thus constituted transfer under section 2(47) and allowed the Short Term Capital Loss claim.

8. Delhi ITAT: Option price received annually by the assessee from its British JV partner as a minimum guarantee for mandatory first sale of shares upon relaxation of FDI norms in the insurance sector is a capital receipt

Dabur Invest Corp[16] ('the assessee') entered into a JV as CUG Life Insurance Co Private Limited which was renamed as Aviva Life Insurance Co Private Limited to carry out the insurance business with CUIH in 74:26 shareholdings. The JV agreement provided for annual payment of option price at 20% of the subscription price by CUIH to Dabur against the right of first refusal at the time of sale of shares by Dabur in the wake of relaxation in FDI policy in insurance sector.

The assessee treated the option money as capital receipt whereas the Income Tax Authorities, relying on Mumbai ITAT ruling in Mahindra Telecommunications Investment Private Limited[17], sought to tax it in the year of receipt as a revenue receipt.

The Tribunal extensively distinguished the Mumbai ITAT ruling in Mahindra Telecommunication and held that neither the frequency of receipt, the manner in which it is dealt with in the books of account, nor how the money is utilized is determinative of it character of tax purpose and classified the option price as advance capital receipt, supplements by referring to JV's dividend policy which prohibits adjustment of dividend received by the assessee against option price.

Further, Tribunal applied the principle of consistency and held that income tax authorities, for eight assessment years, have never taxed the option money so received as revenue income and it cannot change its stand on the same transaction in different assessment years. Therefore, the Tribunal held that "option money received by the assessee is capital receipt

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[16] [TS-63-ITAT-2021(DEL)]
[17] [TS-296-ITAT-2016(Mum)]

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which requires an adjustment only at the time of transfer of the shares by Dabur to CUIH while working out resultant capital gain".

B. Corporate Law Highlights

1. Ministry of Corporate Affairs ("MCA") notifies the date of commencement of provisions of the Companies (Amendment) Act, 2020

Earlier, the Companies Amendment Bill, 2020 was introduced to amend the Companies Act, 2013 (**Act**) with the objective of de-criminalizing various minor offences and amongst other aspects. This Bill received the President's assent and was notified in the official gazette as the Companies (Amendment) Act, 2020 (the Amendment act) on September 28, 2020.

The amendment Act has been notified by MCA and new provisions will be applicable from January 22, 2021. The following are highlights of new provisions of the Companies Act

- **Definition of Listed Companies:** The Amendment Act inserted a proviso to section 2(52) which empowered MCA in consultation with Securities and Exchanges Board of India (SEBI) to prescribe such class of companies which will be excluded from the definition of listed companies. MCA further amended the Companies (Specification of definitions details) Rules, 2014 on February 19, 2021 and excluded following class of companies from the definition of Listed Companies:

  a) Public companies which have listed only their non-convertible debt (NCDs) securities or non-convertible redeemable preference shares (NCPRS) or both issued on private placement basis.

  b) Private companies which have listed their non-convertible debt securities (NCDs) on private placement basis on a recognized stock exchange.

  c) Public companies whose equity shares are listed only on a stock exchange in a foreign jurisdiction or any other prescribed jurisdiction permitted under the Amendment Act. **(Foreign Listing)**

- **De-criminalization of minor offences:** By way of the Amendment, MCA removes criminal punishment such as imprisonment for over 46 offences under the Act, in addition to reducing, modifying and omitting the fines/penalties for contravention of provisions in relation to buyback of securities, disclosure of interest by directors, financial statements and Boards'

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report, formation of companies with charitable objects, disqualification of directors, variation of shareholder rights, transfer of securities, alteration of share capital and reduction of share capital, etc.

- **Foreign listing:** Pursuant to the addition of a new sub-section to section 23 of the Act, certain classes of public companies incorporated in India, as may be prescribed by the Central Government, are permitted to issue securities for listing on stock exchanges in permissible foreign jurisdiction, without requiring compulsory listing in India. The Central Government is also empowered to exempt such class pf public companies from complying with certain provisions of the Act, namely, provisions relating to private placement and public offer of securities, beneficial ownership, share capital and debentures or punishment for failure to distribute dividend, by way of issuing a notification, which has to be placed before both Houses of Parliament.

- **Exemption to NBFCs:** Under the Act, a banking company is exempted from filing the resolutions passed to grant loans or give guarantee or provide security in respect of loans in the ordinary course of its business, with the registrar. The Amendment extends such exemption to a registered non-banking finance company and a housing finance company.

- **Remuneration of Independent Directors:** Prior to the Amendment, in case of inadequate profits, only executive directors/managing director of a company were entitled to receive remuneration subject to limits prescribed in the Act. The Amendment seeks to align the aforesaid provisions to independent directors/non-executive directors to the effect that in case a company has no profits or its profits are inadequate, then non- executive directors, including an independent director, will be entitled to receive remuneration up to the extent permissible under the Act.

- **Financial Results of Certain unlisted Companies:** MCA may require specified unlisted companies to prepare / file financial results on periodical basis.

<u>Katalyst Comments:</u>

The amendments are an endeavor of the Government to facilitate greater ease of doing business especially the one with respect to Foreign Listing. However, the one with respect to the financial results of certain unlisted companies can create significant compliance burden.

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2. Certain provisions of the Companies Act, 2013 extended to LLPs

MCA has issued a notification and extended certain provisions of the Companies Act, 2013 to limited liability Partnerships on February 18, 2021. Highlights are as follows:

- **Disclosures by Significant Beneficial Owners:** Section 90 provides that every 'significant beneficial owner' is required to make a declaration to the company, specifying the nature of his interest and other particulars, in the prescribed manner. This sections have been extended to Significant Beneficial Owners of LLPs. MCA will prescribe rules for determining who will be the SBO and manner in which disclosures are required to be made.

- **Disqualification of Directors, Number of Directorship and Vacation of Office by Director:** Section 164 provides criteria for a person who will be disqualified from being a director in a company, section 165 prohibits a person (individual) from becoming director in more than 20 companies and section 167 provides the manner in which vacancy of a directors to be filled up. These provisions have been extended to LLPs. However, it is still unclear whether these provisions will be applicable to a ‘partner’ or a ‘designated partner’ of an LLP.

- **Other Provisions**: Powers of Registrar for making inspection or inquiry, appeals to NCLT for revival of companies and offences to be regarded as noncognizable, to LLPs. The manner in which these sections will be applicable to LLPs.

3. Company Law Committee proposes certain amendments in Limited Liability Partnership Act, 2008 (‘LLP Act’)

The Company Law Committee (CLC) of MCA submitted its report dated January 4, 2021 and has recommended certain amendments vis-à-vis LLPs. The following are highlights of the proposed amendments:

- **Issuance of secured Non-Convertible Debentures (NCDs):** An LLP may issue secured NCDs only to bodies corporate and trusts which are regulated by SEBI or RBI with certain conditions as given below:

  - The LLP agreement should have an enabling provision and the agreement should have been registered with the Registrar;

  - A register of NCDs should be maintained in prescribed manner;

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- Debenture redemption reserve (DRR) should be created out of the profits of the LLP in prescribed manner;
- An LLP should not make offer or invitation for subscription to persons exceeding 200 in a financial year;
- In case of failure on the part of the LLP to pay interest or redeem the NCDs, the Tribunal may direct an LLP for doing so on the basis of the application made by any or all of the NCD holders;
- Default in compliance by an LLP will make the partners liable for punishment with imprisonment or with fine or both.

- **Introduction of Small LLPs:** The Committee proposed the concept of 'Small LLPs' particularly to promote ease of doing business by micro and small enterprises. The proposed definition of small LLPs will be based on contribution and turnover not exceeding 25 lacs or 40 lacs respectively, or such higher amount as may be prescribed. Such small LLPs will be able to enjoy several privileges such as reduced filing fees, lesser compliances, lesser fees and penalties and certain exemption with respect to applicability of certain accounting standards. The same will reduce cost of compliances and will facilitate ease of doing business by MSMEs/ small LLPs.

- **Restriction on certain business activities by an LLP:** On concerns raised by RBI on LLPs carrying out non-banking financial activities as it allegedly bypasses the NBFC regulations issued by RBI, the Report of the committee has proposed insertion of a new proviso to the definition of 'business' which will give power to the Central Government to include or exclude any 'business activities' by way of a Notification.

- **Restriction for merger of LLPs with a company:** The CLC Report has recommended amendment in section 62 of the LLP Act to restrict any amalgamation of an LLP with a company.

- **Decriminalisation of certain offences:** In line with the Government's objective to facilitate ease of doing business, the CLC Report has suggested removal of criminal punishment such as imprisonment for non-serious matters such as violation of provisions with respect to change in designated partner, change in registered offices, registration of change in partners, etc.

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4. NCLAT allows appeal challenging NCLT order rejecting a scheme for amalgamation proposed by Appellants citing MCA General Circular on 'Appointed Date'

NCLAT allowed appeal filed by RHI India Pvt. Ltd[18] challenging NCLT order rejecting a scheme for amalgamation proposed by Appellants. NCLT has rejected the scheme citing reason that due to the significant gap in the appointed date of the Scheme and the valuation date, the scheme is only benefitting few shareholders and contrary to public policy.

The National Company Law Appellate Tribunal (NCLAT) observed / held that no minority shareholders had come forward to oppose the Scheme neither objections were raised by SEBI or any regulatory authority. Further, NCLAT stated that "the commercial wisdom of the shareholders shall not be overlooked by the NCLT and the scheme cannot be said to be violative of public policy just on the ground that NCLT considered that the scheme appears to benefit only a few shareholders of Transferor Company without giving any reasonable finding."

NCLAT further held that "NCLT while passing the impugned order has overreached its scope of Judicial Intervention in determination of the Scheme of Amalgamation under section 230-232." And referring to the MCA Circular clarifying that section 232(6) of the Act enables the companies in question to choose and state in the scheme an 'appointed date', NCLAT stated that NCLT shall not reject the Scheme solely on the ground that the appointed date and valuation date is different and directed the concerned Regional Director to monitor that the scheme is implemented according to the appointed date as specified in the scheme document.

Katalyst Comments:

With respect to the 'Appointed Date', the MCA in its General Circular[19] had enabled companies to choose and state in the Scheme an 'Appointed Date'. This date may be a specific calendar date or may be tied with the occurrence of an event, such as grant of license by a competent authority or fulfilment of any pre-conditions agreed upon by the parties, or meeting any other requirement as agreed upon between the parties, etc., which are relevant to the Scheme.

This issue was decided by considering the facts of the case and one should not rely blindly on the judgement. The General Circular issued by the MCA had made reasonable clarifications in regards to the Appointed Date under section 232(6) of the Companies Act and one should always keep this in mind while deciding Appointed date of the scheme.

[18] LSI-70-NCLAT-2021(NDEL)
[19] MCA General Circular dated August 21, 2019

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C. Securities' Law Highlights

1. Amendment in the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018

SEBI has amended the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (ICDR Regulations) to provide as under:

(a) Further Public Offer: Amongst other, the requirement of minimum promoters' contribution shall not be applicable in the following situation - where the equity shares of the issuer are frequently traded on a stock exchange for a period of at least 3 years immediately preceding the reference date, and:

- the issuer has redressed at least 95% of the complaints received from the investors till the end of the quarter immediately preceding the month of the reference date, and;
- the issuer has been in compliance with the LODR for a minimum period of 3 years immediately preceding the reference date.

(b) Preferential Issue: As per the extant norms, the equity shares issued on a preferential basis, pursuant to any resolution of stressed assets under a framework specified by the RBI or a resolution plan approved by the Tribunal, under the IBC, shall be locked-in for a period of one year from the trading approval. As per the amendment, the lock-in provision shall not be applicable to the specified securities to the extent to achieve 10% public shareholding.

2. Liability of a Non-Executive Independent Director: SAT quashes SEBI order debarring Non-Executive Director from accessing the Securities Market for a period of 5 years citing reasons as absent involvement in fraudulent GDR issue

The appellant[20] filed appeal with the Hon'ble Securities Exchanges Tribunal (SAT) against the SEBI order, debarring the appellant from accessing the securities market for a period of 5 years. The appellant was a Non-executive Independent Director of MPS Infotecnics Ltd. SEBI had issued a show cause notice to various noticees, including the appellant[21], alleging violation of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (PFUTP) on the grounds that

[20] LSI-933-SAT-2020(MUM)

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(a) the GDR proceeds were diverted, and concealing and suppressing such material facts was in violation of the provisions of SEBI Act and PFUTP Regulations;
(b) since the Appellant was a signatory to the resolution to open a bank account for receiving the subscription money in respect of GDR, he was responsible and equally guilty of the aforesaid violation.

The appellant had argued that he was a Non-Executive Independent Director in the Company and was not involved in the day-to-day affairs of the management of the Company, and was only involved in policy decisions and the resolution that he signed was only for opening of bank account and could not be stretched for giving GDR proceeds as a loan to a third party who did not exist on the date when resolution was passed.

SAT relied on its decision in Adi Cooper to hold that the concept of fraud emerging through the said resolution signed by the appellant did not arise, as the said third party was nowhere in the picture as on resolution date. Further, SAT also remarked that there was no finding given by SEBI that the appellant was involved in the day-to-day affairs and management of the Company and therefore allowed the said appeal.

D. Foreign Exchange Laws Highlights

1. Standard Operating Procedure for Processing FDI Proposals by DPIIT

The Department for Promotion of Industry & Internal Trade (DPIIT) has placed a Standard Operating Procedure (SOP) for processing FDI Proposals on its website (www.dipp.gov.in). Salient points of the SOP are as follows:

(a) Following proposals will require security clearance from the Ministry of Home Affairs:

- Investments in Broadcasting, Telecommunication, Satellites - establishment and operation, etc.

- Investments from an entity of a country which shares land border with India or beneficial owner of an investment into India is situated in any such country or a citizen of any such country.

(b) Specific issues of proposals requiring clarification from the point of view of FDI Policy may be referred to the DPIIT for clarification, with the approval of Secretary of the concerned Administrative Ministry / Department.

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(c) In case of proposals involving total foreign equity inflow of more than Rs. 5,000 Cr, Competent Authority shall place the same for consideration of Cabinet Committee on Economic Affairs.

E. Other Highlights

1. Amendments in Maharashtra Stamp Act, 1958

The Maharashtra Government has by the Maharashtra Stamp (Amendment and Validation) Ordinance 2021 (Ordinance) amended the Maharashtra Stamp Act, 1958 (Maharashtra Stamp Act). The amendment are as follows:

- Amendment to Section 5: The Ordinance has inserted the expression 'or transactions' after 'several distinct matters' as appearing in section 5 of the Maharashtra Stamp Act. With this amendment, The Government desires to stamp the underlying transactions instead of the instrument especially in the case of mortgage for multiple beneficiaries.

- Amendment to Article 6 of Schedule I: The Ordinance has increased the stamp duty payable on an agreement relating to deposit of title deeds, pawn, pledge or hypothecation where the amount secured exceeds INR 5 lakh from '0.2%' to '0.3%' subject to the existing cap of INR 10 lakhs. Further, any instrument providing for additional security in the form of hypothecation or equitable mortgage shall be stamped for nominal amount of INR 500 if full stamp duty is paid on Primary security.

- Amendment to Article 40(b) of Schedule I: The Ordinance has reduced the stamp duty on a mortgage deed (other than agreement specified in Article 6) where possession of the subject property is not given or agreed to be given from '0.5%' to '0.3%' subject to the existing cap of INR 10 lakhs.

- Validation of Proceedings: Clause 4 of the Ordinance specifically validates any actions initiated under the existing section 5 and Articles 6 and 40 in Schedule I of the Maharashtra Stamp Act. Further, no suit is maintainable for refund of the stamp duty levied or collected.

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F. Goods and Service Tax Highlights

1. Vires of Rule 96(10) of the CGST Rules, 2017 (‘CGST Rules’) challenged and interim relief granted by the Bombay High Court

The petitioner challenged the initiation of investigation by Director of Revenue Intelligence, Kolkata and filed the writ petition before the Bombay High Court challenging vires of Rule 96(10) of the CGST Rules. Further, the petitioner submitted that payment of IGST already made at the time of export and hence, question of refund of IGST benefit availed at the time of import under Advance Authorization doesn’t arise. Also, retrospective applicability of Rule 96 (10) of the CGST Rules has been challenged. In this regard, the Bombay High court has granted an interim relief or stayed recovery of IGST payment until next date.

Katalyst comments:

Welcome judgment by the Bombay High court. The Government should amend the GST law to provide that if IGST rebate has been claimed by the Advance Authorization holders by making payment of IGST at the time of export, then no double benefits are claimed by the exporters since in order to claim the IGST rebate, IGST should be paid first at the time of export. Further, the Government should also bring clarity that the restriction provided by Rule 96(10) of the CGST Rules is applicable prospectively and not retrospectively.

2. ITC of tax paid on iron/steel pillars tightened up with nuts and bolts for temporary structure is not available as it is an immovable property

The issue before the Haryana[22] Authority of Advance Ruling (‘AAR’) was whether the ITC of the tax paid on iron/steel pillars tightened up with nuts and bolt used for the creation of temporary structure (i.e., hall or pandal or shamiana or any other place) is admissible under section 16 of the CGST Act, 2017 (‘CGST Act’) or not. In this regard, the AAR has held that the civil work has been undertaken on a very large scale at the premises which indicates the permanent nature of the construction/ erected and applicant does not plan to dismantle and move the structure to some other place. Further, the concrete base and the pillars used as platform and support to the structure are also of large dimensions and the platform or the structure cannot be put to beneficial use without the existence of the other. Hence, structure created by the applicant is immovable property and ITC of tax paid on iron/steel pillars is not available.

[22] In the matter of M/s VDM Hospitality Pvt. Ltd. [2021-TIOL-60-AAR-GST]

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3. Forfeiture of amount for breach of agreement of sale of land is liable to GST as ‘declared service’

The Gujarat[23] AAR has held that amount forfeited by applicant (seller) as a result of breach of sale agreement of land by purchaser is liable to GST as the same is covered under ‘declared service’ as per clause 5(e) of Schedule II (supply of services) of the CGST Act. The applicant’s argument that as the sale of land is not liable to GST, amount forfeited for breach of sale agreement should not be liable to GST has been disregarded.

Katalyst Comments:

The AAR has not considered the amendment made under section 7 of the CGST Act whereby the activity first needs to be classified as ‘supply’ under section 7 of the CGST Act and then it can be treated as supply of goods or services as per schedule II of the CGST Act.

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[23] In the matter of Fastrack Deal Comm Pvt. Ltd. [TS-1216-AAR(GUJ)-2020-GST]

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